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LEGISLATION TO AMEND THE HART-SCOTT-RODINO ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 431

A BILL TO AMEND THE CLAYTON ACT REGARDING PARTNERSHIPS

AND

S. 432

A BILL TO AMEND THE CLAYTON ACT REGARDING MERGERS

FEBRUARY 26, 1987

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LEGISLATION TO AMEND THE HART-SCOTT-RODINO ACT—S. 431 AND S. 432

THURSDAY, FEBRUARY 26, 1987

U.S. Senate,
Subcommittee on Antitrust,
Monopolies and Business Rights,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:37 a.m., in room SD–562, Dirksen Senate Office Building, Hon. Howard Metzenbaum (chairman of the subcommittee) presiding.

Also present: Senator Heflin.

Staff present: Eddie Correia, chief counsel and Priscilla Budeiri, counsel.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator Metzenbaum. The hearing will come to order.

The Chair wishes to announce that I do not know if it is possible, but if I could conclude this hearing by 11:00, the Chair would like to in order that I might hear the live press conference in connection with the Tower Commission report. It may not be possible to do that, but I am going to try to.

The hearing this morning concerns the backbone of enforcement of the merger laws, the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Hart-Scott-Rodino enables the Federal Trade Commission and the Department of Justice to examine large mergers before they are completed for their probable effect on competition.

Mergers that are likely to harm competition can be stopped before they occur, not years later after the merged firm has reaped monopoly profits from consumers. The goal of my two bills, S. 431 and S. 432, is to enhance enforcement of the merger laws under Hart-Scott-Rodino.

S. 431 addresses the partnership loophole. Currently, entities trying to merge are able to avoid antitrust review by creating a partnership to be the acquiring firm. Consequently, wealthy individuals and large corporations can escape reporting huge deals.

T. Boone Pickens' attempted acquisitions of Phillips Petroleum and Diamond Shamrock and Sir James Goldsmith's attempted acquisition of Goodyear all slipped by antitrust enforcement due to the partnership loophole.

Antitrust issues may very well have been implicated in some takeovers that escaped review. For example, both Diamond Shamrock and the partners behind the Pickens partnership are engaged in the exploration, refining and marketing of crude oil and natural gas.

We cannot know the exact implications of this overlap, but we do know that the enforcement agencies never had a chance to conduct a pre-merger review because of the partnership loophole.

On September 24th, 1985, the Federal Trade Commission filed notice of proposed rulemaking to close the partnership loophole. Almost a year-and-a-half later, the loophole is still as wide as ever.

Just a short time ago after I introduced S. 431, the FTC released a new proposal which is still a long way from adoption. While the FTC's proposed rule is similar to my bill in one respect, it does not, by the Commission's own admission, cover all the ways in which Hart-Scott-Rodino can be evaded by the formation of a partnership.

My other bill, S. 432, contains four amendments to the Act. First, it increases the dollar value of mergers for which a filing is required. If the enforcement agencies are relieved of reviewing small transactions that typically do not pose antitrust problems, they will be free to conduct more thorough investigations of the transactions that raise more serious antitrust issues.

Second, S. 432 equalizes the length of time cash tender offers and other mergers must wait before consummation. The mergers of Gulf and Socal, valued at $13.2 billion, and Texaco and Getty, valued at $10.1 billion, were structured as cash tender offers. As a result, the law gave the FTC only 25 days to analyze these mega-mergers.

Third, my bill lengthens the time in which the enforcement agencies may conduct their review of mergers valued at more than $1 billion. These mergers are likely to involve more products and a more extensive antitrust analysis. My bill lengthens the time period only if the enforcement agencies have already determined that the mega-merger raises questions about competition that require more information to analyze.

Under current law, the antitrust enforcers simply have too little time to do a responsible job evaluating many massive acquisitions.

Finally, my bill restores the practice of letting State attorneys general have access to pre-merger notification filings. This provision facilitates States' antitrust enforcement of interstate competition issues while preserving the confidentiality of the information filed under the Act.

Now, we do have statements from Senators Thurmond and Hatch which we will insert in the record at this point. Also the texts of S. 431 and S. 432.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman, today's hearing focuses on proposals by the Distinguished Chairman of the Subcommittee to amend several features of the pre-merger notification system established by the Hart-Scott-Rodino Act of 1976. The first of those proposals appears to be noncontroversial—it would require partners in partnerships created for proposes of acquisitions to disclose their assets and their lines of businesses. It is my understanding that the Federal Trade Commission and the Antitust Division have come close to promulgating a regulation with a similar purpose.

The second set of proposals would extend the waiting period for antitrust review of mergers that are structured as cash tender offers, and those proposals may raise more difficult questions. Currently, the waiting period for cash tender offers is shorter than the waiting period for other types of acquisitions, and it is my understanding that the Congress chose the shorter period in 1976 in order to avoid delaying the completion of cash tender offers in the stock market. During our deliberations on this bill, I hope that we will learn what impact a longer waiting period would have on the stock market and on the potential success of cash tender offers.

Another question raised by the bill is whether the confidential information filed by companies under Hart-Scott-Rodino should be disclosed and made available to the State Attorneys General. Two courts of appeals have read the original legislation and the legislative history to say that Congress did not intend for the States or other parties to have access to that material. These are some of the issues we will be exploring in our hearing on these bills.

Mr. Chairman, I thank the witnesses for their contributions, and I look forward to their testimony.

Prepared Statement of Senator Orrin G. Hatch

Mr. Chairman, one the most important questions facing us is the question of hostile takeovers. Commentators have asked: Should Congress take steps to slow hostile takeover activity, at the risk of protecting inefficient management and slowing a historic restructuring of corporations in America?

Our hearings will shed a great deal of light on this question and I look forward to the witnesses' testimony. I would like to make one point, however, in the hope that the witnesses will comment on it.

We have had a chance to look at companies that were targets of real or threatened takeovers over the past few years. We continue to find examples of companies that are leaner and more competitive as a result of this activity. Though I am sure there are examples to the contrary, given the need for our American corporation to become more competitive, I am extremely interested in knowing how to design legislation that will prevent unhealthy takeovers while permitting those that serve our competitive goals. My initial impression is that this is impossible to do just as it is impossible to design legislation to prevent any bad or misguided business judgment.

How have these companies been made more competitive? The New York Times reports that Phillips Petroleum sold nearly $2 billion in non-oil real estate that fit poorly in its corporate scheme and has adopted a less speculative drilling strategy; Disney brought in a brand new management team, 60 new executives who "set this place afire" according to one employee and its stock prices reflect the increase; and Time magazine reports that Control Data, which was never actually a target, sold off 20 subsidiaries which were not related to the computer field, and 80 percent of Commercial, a large financial services subsidiary, and analysts now predict a profit of $80 million or more, compared with a loss of $264 million last year. I wonder whether this restructuring of corporate America, in the long run, will help make us more competitive in the worldwide marketplace. If so, we must be very cautious about efforts to curb takeovers.

Passage of the Hart-Scott-Rodino Act was a landmark in the development of our antitrust laws. It enables the government to review proposed mergers before they take effect and block mergers that would concentrate too much economic power in one entity. It is important that the antitrust agencies have sufficient time to accomplish the policies of the Hart-Scott-Rodino Act and I commend you, Mr. Chairman, for holding today's hearing to review that question.

At the same time I am concerned that the Hart-Scott-Rodino Act not be used indirectly as a tool to prevent those mergers that would be beneficial to the economy.

Mr. Chairman, we should not confuse the policies of our antitrust laws with the policies that underlie our securities laws. Questions concerning takeovers, corporate restructuring and U.S. competitiveness in the worldwide marketplace should be addressed directly. We should not inadvertently make procedural changes in the Hart-Scott-Rodino Act that would prevent mergers and takeovers that present no antitrust problems.

Mr. Chairman, you have announced a hearing next month of the issues of mergers and takeovers which will give us an opportunity to examine the other issues I have mentioned and their relationship to the Hart-Scott-Rodino Act.

Today we are here to examine the working of the Hart-Scott-Rodino Act and I look forward to the testimony.

II

100TH CONGRESS
1ST SESSION

S. 431

To amend the Clayton Act regarding partnerships.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 2, 1987

Mr. METZENBAUM (for himself, Mr. DECONCINI, and Mr. SIMON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Clayton Act regarding partnerships.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7A of the Clayton Act is amended by adding at the end thereof the following new subsection:

"(k) For purposes of this section, the term 'person' shall include, in the case of a partnership, any general partner and any partner with an equity interest of 50 per centum or more.".

SEC. 2. This Act and the amendment made by this Act shall apply to every acquisition which is consummated after the date of enactment of this Act.

100TH CONGRESS
1ST SESSION

S. 432

To amend the Clayton Act regarding mergers.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 2, 1987

Mr. METZENBAUM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Clayton Act regarding mergers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7A(a) of the Clayton Act is amended—

(1) in paragraph (2), by striking out "$10,000,000" each place it appears in subparagraphs (A), (B), and (C) and inserting in lieu thereof "$15,000,000"; and

(2) in paragraph (3)(B), by striking out "$15,000,000" and inserting in lieu thereof "$25,000,000".

SEC. 2. (a) Section 7A(b)(1)(B) of the Clayton Act is amended by striking out "(or in the case of a cash tender offer, the fifteenth day)".

(b) Section 7A(e) of the Clayton Act is amended—

(1) by striking out "(or in the case of a cash tender offer, the 15-day waiting period)" each place it appears,

(2) in paragraph (2) by striking out "(or in the case of a cash tender offer, 10 days)", and

(3) by adding at the end thereof the following new paragraph:

"(3) If, as a result of an acquisition to which subsection (a) applies the acquiring person would hold an aggregate total amount of the voting securities or assets of the acquired person in excess of $1,000,000,000 in value, the additional waiting period provided in paragraph (2) of this subsection shall be 60 days.".

SEC. 3. Section 7A(h) of the Clayton Act is amended by inserting before the period at the end thereof the following: ", or to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information or documentary material will be maintained in confidence. The maintenance of confidence requirement does not preclude any use of such information or documentary material for official law enforcement purposes, including the preparation of comments regarding consent agreements or decrees proposed by the Commission or the Attorney General under any of the antitrust laws or the Federal Trade Commission Act".

SEC. 4. This Act and the amendments made by this Act shall become effective on the date of enactment of this Act.

Senator METZENBAUM. Our first panel today consists of Patricia Bailey, Commissioner of the FTC; Terry Calvani, Commissioner of the FTC; and Andrew Strenio, also a Commissioner of the FTC.

We are very happy to welcome you and thank you for taking the time to be with us this morning.

Ms. BAILEY. Thank you very much, Mr. Chairman.

Senator METZENBAUM. I might say, Ms. Bailey, that we will try to follow a 5-minute rule for each of the persons testifying. I think you have already been advised of that. Your entire statements will be included in the record.

STATEMENT OF A PANEL CONSISTING OF PATRICIA BAILEY, COMMISSIONER, FEDERAL TRADE COMMISSION; TERRY CALVANI, COMMISSIONER; AND ANDREW J. STRENIO, JR., COMMISSIONER

Ms. BAILEY. Thank you, Mr. Chairman. It may take me a slightly longer time, as I am going to summarize the Commission's testimony. It may take a little more than 5 minutes, but then I have no individual statement.

Senator METZENBAUM. Very good.

Ms. BAILEY. First of all, I wanted to say that we very much regret that Chairman Oliver is unable to be here to deliver the Commission's testimony. He is, as you know, heading the United States delegation to the OECD in Paris this week.

Also, Commissioner Azcuenaga has asked us to apologize for her inability to appear this morning; she, too, is away from the city.

As you suggest, we do have prepared testimony which we would like to submit for the record, and I will summarize it here. In each case, the position that I describe represents a view of the majority of the Commissioners, although some Commissioners disagree with some of these positions.

Chairman Oliver and Commissioner Azcuenaga have submitted individual statements regarding their views, and Commissioners Calvani and Strenio will also make remarks with respect to theirs.

I will begin the summary with S. 431 and the partnership loophole. The Commission agrees that this loophole must be closed. It may be important to stress that the loophole was not created by the Hart-Scott-Rodino Act, but rather is the result of our rules and our interpretations of them.

As a consequence, the problem can be addressed by modification of our rules, and we have proposed a change, as you noted, to accomplish that. Our proposed rules change differs, as you noted, somewhat from the amendment contained in S. 431.

Let me say generally, and without getting into technicalities which can be mind-bending, that we believe the proposed fix in S. 431 may overreach the problem that the antitrust authorities have encountered.

Our proposal is narrower than that contained in S. 431 and is directed at the precise type of situation which has occurred. We prefer it to S. 431 for that reason and because we can more easily modify it further if circumstances warrant. A statute, on the other hand, would present us and those affected by its new reporting requirements with greater inflexibility should further problems appear.

Senator **Metzenbaum**. When do you think your rule change would become effective?

Ms. **Bailey**. Well, it is out for comment now, and depending on what comments we get, 3 months.

Senator **Metzenbaum**. Well, you have actually had something pending, have you not, for a year-and-a-half?

Ms. **Bailey**. We had an earlier proposal, Mr. Chairman, which during the comment period was shot down, and that is the reason that we had to try to formulate another proposal. I make no apologies for our delay. We have known about this loophole long enough to have solved it and we have not, but we are trying right now.

Senator **Metzenbaum**. Please proceed.

Ms. **Bailey**. Let me summarize our positions with respect to the amendments proposed in S. 432.

We oppose the provision that would raise the size of person threshold from $10 to $15 million and the size of transaction threshold from $15 to $25 million. Had those thresholds been higher in the past, filings would not have been made for many transactions that have resulted in enforcement action.

Over ten percent of the mergers the Commission has challenged in the last 10 years have involved transactions valued at between $15 and $25 million. Moreover, had the thresholds been at the higher level proposed in S. 432, it only would have eliminated 4 percent of merger filings.

For these reasons, the Commission opposes raising the threshold dollar amounts. I should note that Chairman Oliver disagrees and supports raising the thresholds.

S. 432 also proposes to eliminate the shorter waiting periods for cash tender offers that are now 15 and 10 days rather than the 30 and 20-day periods allowed for review of other mergers and acquisitions.

There is no question that the Commission could have benefitted in the past with some additional time to review these transactions, and we agree that there is no necessary correlation between how a transaction is structured and the antitrust issues that it may raise.

We do know, however, that the time periods for review of cash tender offers were originally set by the Congress to correlate with the securities laws and, in particular, the Williams Act.

If extending the antitrust review periods for cash tender offers would not complicate the operation of the Williams Act, we would support this provision of S. 432. However, if our current understanding of the Williams Act is correct, and we are not positive that it is, but if it is correct, then we would oppose extension of the initial period, but we do support extension of the post-second request time period to 20 days. Chairman Oliver opposes extending the time periods for cash tender offers.

Senator **Metzenbaum**. Chairman Oliver——

Ms. **Bailey**. Opposes extension of the time periods.

Next, S. 432 would extend the post-second request waiting period from 20 to 60 days for mergers that exceed $1 billion. Now, the Commission's experience is that size alone is not a reliable indicator of the antitrust complexity of a merger, so that we would not, based on our experience, have recommended a longer waiting period for mergers based simply on their dollar size.

Nevertheless, if we understand S. 432 to allow us to retain the discretion to grant early termination and simply to afford us more time if we actually need it, then we do not oppose this provision.

Senator **METZENBAUM**. That is the intent.

Ms. **BAILEY**. Last, S. 432 would grant access to Hart-Scott-Rodino materials to State and other Federal law enforcement authorities. The Commission supports this provision, with certain important reservations.

In introducing this provision, Mr. Chairman, you said that it was your intention to return to the situation which existed before 1984 when the Commission decided that it could not release those submissions to State authorities.

The situation then was that the Commission shared Hart-Scott-Rodino materials with State attorneys general at its discretion and only when those officials certified that the material was requested for law enforcement purposes and that it would be kept confidential.

Therefore, the Commission would support a provision of this kind so long as, first, it was clear on its face that the Commission or the assistant attorney general had the discretion to provide these materials; second, so long as it is clear that disclosure may be afforded only upon prior certification that all materials will be maintained in confidence and used only for law enforcement purposes; and, third, that the section permitting its use for comment on FTC or Department of Justice consent agreements or decrees be deleted.

That concludes my summary, Mr. Chairman, and after Commissioners Calvani and Strenio have offered their remarks, we will all be available to answer questions regarding the Commission's testimony.

Senator **METZENBAUM**. Thank you, Ms. Bailey.

Mr. Calvani.

Mr. **CALVANI**. Thank you, Mr. Chairman. I am delighted to be here to discuss S. 431 and S. 432 with you and members of the Committee.

Mr. Chairman, over the years I perceive that you and I have had many areas of disagreement with reference to the Federal antitrust laws—have had, do now, and probably will have. Accordingly, I am delighted that we have found subjects on which we can agree within the contours of these two bills.

Mr. Chairman, I join, with minor exception, in the statement of the Commission as submitted and as summarized by Commissioner Bailey. Rather than repeat what has already been said before, I would, with your permission, like to submit my prepared remarks for the record.

Senator **METZENBAUM**. Without objection, they will be included.

Mr. **CALVANI**. Thank you, Mr. Chairman.

I would, however, like to briefly note one difference with my colleagues. Section 2 of S. 432 provides an equal waiting period for cash tender offers. Unlike the Commission, I endorse this provision as drafted. I do so provided that the policies of the Williams Act can be accommodated, and I believe they can.

Two additional points. First, in endorsing extensions of time, I recognize that these changes come at cost; they are not without cost, but I think the costs are worth the candle in this instance.

Second, I urge the committee to consider all these proposed changes very carefully, with particular attention to the technical details. With all due respect, previous congressional tinkering with Hart-Scott-Rodino process has not always worked out.

In 1984, for example, the Congress created a special ten-day waiting period for initial filings under Hart-Scott-Rodino if the acquired firm is in bankruptcy. Moreover, under this special provision recently enacted by the Congress with reference to Hart-Scott-Rodino, there is no automatic right to ask for more information, and thus even extend the period beyond the 10 days.

The committees with antitrust jurisdiction held no hearings of which I am aware. The Commission was never advised of the bill, nor asked for comments, nor apparently was the Antitrust Division.

Experience with this new provision enacted by the Congress with reference to Hart-Scott-Rodino has not been encouraging. One recent filing arrived at the Commission on January 20, just before the Martin Luther King holiday and the bad weather that followed it.

The practical result was, as a result of this recent amendment by the Congress, there were two business days to review the transaction.

My point is simply this, that as we look at these statutes, particularly as they relate to the securities laws, we need to be very careful in making our amendments.

This concludes my separate remarks. I would be delighted to answer any questions that the committee might have about these remarks or about the Commission's submissions, and I thank you for the opportunity of being here this morning.

[Statement and response to questions follow:]

SEPARATE STATEMENT OF COMMISSIONER TERRY CALVANI

I have only one area of disagreement with the Commission's testimony, and that concerns the proposal in Section 2 of S. 432 to set the same waiting periods for cash tender offers as for other transactions. I agree that the shorter time periods now in effect tax our resources to the limit. I also am concerned that the Hart-Scott-Rodino timetable not supplant the Williams Act timetable completely. Both sets of policies must be accommodated, those of the antitrust laws and those of the securities laws.

I agree, however, with the proposal to make the waiting periods for all transactions the same. Such an action will not be costless. There probably will be cases that will take longer to resolve, even if early termination is granted, simply because there will be more time available. In general, though, I have faith that our merger review process will not impair the tender offer process where there are no competition concerns. Early termination will be granted when it can be determined quickly that there are no problems. Where problems appear, the longer time periods will give us a much better chance to come to sound conclusions about their solution.

As to coordination with the Williams Act, that may prove to be something that also has to be solved. That does not mean that this proposed change in the Hart-Scott-Rodino deadlines should be held up until the solution is reached. The solution might as well be in the securities law and regulation, as in the Hart-Scott-Rodino program. Right now, I do not know what, if anything, might need to be done. Although I am not a securities expert, I understand that the effective timetable for tender offers under the Williams Act is now significantly longer than it was when the Hart-Scott-Rodino Act was passed. Thus the need for a special shorter period to accommodate the Williams Act may be less pressing.

I urge the subcommittee to consider all of these proposed changes carefully, with particular attention to the technical advice of the enforcement agencies about how the premerger reporting program has worked in practice. Previous Congressional tinkering with the Hart-Scott-Rodino process has not always worked out as intended. In 1984, the Congress created a special ten-day waiting period for initial filings if the acquired firm is in bankruptcy. Moreover, under this special provision there is no automatic right to ask for more information and thus extend the ten-day period. To get more information and/or stay the transaction pending investigation, the enforcement agencies must petition the bankruptcy judge. Bankruptcy Code, Section 363(b)(2), 11 U.S.C. Sec. 363(b)(2). This new Hart-Scott-Rodino procedure in the comprehensive bankruptcy reform legislation was handled by the banking committees. The committees with antitrust jurisdiction never saw the provision or commented on it, and the Commission was never advised of it or asked for comments (nor, apparently, was the Antitrust Division).

Experience with the new special provision is not encouraging. One recent filing arrived on January 20, just before a holiday and several snowstorms. The special bankruptcy waiting period was flagged by the premerger notification office, but still the practical result was that there were two business days to review the transaction. In the merger frenzy to beat the new tax bill late last year, several other filings were received involving bankruptcy proceedings.

To date, none of these transactions has raised any competitive concerns. The fact of bankruptcy proceedings is no guarantee that competition problems are absent, however. Indeed, cases involving bankrupt entities often raise knotty analytical problems because of the strict and sometimes difficult elements of the failing firm defense. By being in bankruptcy, the acquired companies will probably satisfy the first, and typically most difficult, part of the test, that the company really was failing. But the second element would remain to be established -- that no other acceptable acquirers were located, despite reasonable effort. Although this element usually can be determined by straightforward means, it is not necessarily something that can be determined in less than ten days, particularly if most of that time must be spent investigating whether the acquisition raises competition problems.

This concludes my separate remarks. I would be glad to answer any questions the Committee might have about these remarks or about the Commission's submission.

RESPONSE TO SENATOR HOWELL HEFLIN'S QUESTION CONCERNING THE ORIGIN OF THE "PARTNERSHIP LOOPHOLE."

We note at the outset that acquisitions by partnerships are not exempt from the Hart-Scott-Rodino Premerger Reporting Program. A partnership that meets the statutory total assets or annual net sales criteria is subject to the same obligations imposed by § 7A of the Clayton Act as any other business. Section 7A of the Act does not apply if the person making an acquisition has less than $10 million in annual net sales or total assets. As a result of two premerger reporting policies, newly-formed partnerships often do not have to report. The so-called "partnership loophole" exists because in adopting these policies for other reasons, the Comission did not anticipate that acquisitions meriting antitrust scrutiny would be made through minimally capitalized, newly-formed partnerships.

The two concepts from which the "partnership loophole" arises are: (1) if a business does not have a "regularly prepared" balance sheet, we do not include cash that will be used to make the acquisition in determining whether the firm meets the $10 million minimum asset criteria of § 7(A)(a)(2); and (2) no person is deemed to "control" a partnership. Both of these concepts were developed in the late 1970's as staff interpretations of the Act and the Commission's premerger notification rules. The first will be codified as 16 CFR § 801.11(e) on April 10, 1987. 52 Fed. Reg. 7066 (March 6, 1987). The second would be modified by the Commission's pending partnership control rule. 52 Fed. Reg. 7095 (March 6, 1987).

The first concept relevant to the "partnership loophole" concerns which assets of an acquiring entity should be counted to determine whether it meets the statutory $10 million minimum-size-of-person test. The test is satisfied if the person's "last regularly prepared" balance sheet includes assets totaling $10 million or more (See 16 CFR § 801.11(c)). A newly-formed entity -- incorporated or not -- will not have a "regularly prepared" balance sheet. In determining whether a newly-formed entity that does not have a balance sheet has $10 million in total assets, the Commission directs the acquiring person not to count assets that will be used in making the acquisition. This "flow through" concept, which will be codified by 16 CFR § 801.11(e), means that a newly-formed entity with $1,009,000,000 in assets does not meet the $10 million minimum-size-of-person test if $1 billion of its assets are to be used to make an acquisition.

The Commission adopted this rule to facilitate antitrust review. Section 7 of the Clayton Act is concerned with combinations of assets that may lead to a substantial lessening of competition. No matter how much an entity spends to make an acquisition, the acquisition is not likely to make any difference from an antitrust perspective if the acquirer has no other significant assets. The transaction reflects simply a change in ownership of a fixed set of assets.

This "flow-through" concept applies equally to both corporations and partnerships. The distinctive treatment of partnerships arises from the definition in the rules of when one entity controls another. Thus, the definition of "control" is the second source of the "partnership loophole."

"Control" is one of the core concepts of the premerger notification program. The obligation to report rests upon the persons that ultimately control the entity making an acquisition and the entity being acquired (defined in 16 CFR § 801.1(a)(3) as "ultimate parent entities"). A corporation acquiring another corporation will often create a new subsidiary to make the actual acquisition. That new subsidiary is generally irrelevant to the question of whether the acquisition may have the effect of substantially lessening competition. What is relevant is the degree of existing or potential competition between all businesses controlled by the subsidiary's ultimate parent and the businesses being acquired. Thus, the Commission's rules attribute the acquisition to that ultimate parent entity and require the ultimate parent entity to add all of its assets and all the assets of entities it controls to determine whether it meets the $10 million minimum size-of-person criteria.

Under 16 CFR § 801.1(b) a corporation is deemed to be controlled by any person that holds fifty percent or more of its outstanding voting securities, or has the contractual power to designate a majority of its directors. A partnership, however, is not deemed to be controlled by anyone; it is its own ultimate parent entity.* Consequently, while a newly-formed corporation might have no assets other than the cash to make an acquisition, it would still meet the $10 million size-of-person criteria if 50 percent or more of its voting securities were owned by a company with total assets of $10 million. The control rule would deem that $10 million parent company to be the acquiring person. In contrast, a partnership that was 95 percent owned by a $1 billion company would not necessarily meet the minimum size criteria. The control rule would not deem the partnership to be controlled by the billion dollar company.

The conclusion that no person controls a partnership was developed as an informal, unwritten staff interpretation in response to telephone inquiries. There is no complete, articulated record of the staff's reasoning. Nevertheless, several factors seem relevant. In formulating 16 CFR § 801.40 concerning the formation of joint ventures, the Commission revised the rule from the way it had originally been proposed to make the formation of partnerships not a reportable event.

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* The control rule, 16 CFR § 801.1(b) provides:

> (b) Control. The term "control" . . . means either (1) holding 50 percent or more of the outstanding voting securities of an issuer; or (2) having the contractual power presently to designate a majority of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

In informal interpretations, however, the Commission staff has expressed its view that partnerships generally do not have individuals exercising functions similar to directors of a corporation.

Partnerships were excluded on the grounds that such "ventures usually do not engage in marketing and are primarily risk sharing devices" (43 Fed. Reg. 33486, July 31, 1978). In other words, there was some reason to believe that the usual activities of partnerships normally were less likely to be of interest to antitrust authorities. Moreover, the "control" rule, 16 CFR § 801.1(b), does not directly address partnerships, thereby indicating that, when the initial rules were promulgated, the Commission did not consider it vital to define who controlled partnerships.

In addition, there were practical and theoretical problems in developing a useful control of partnership rule. At common law, one partner can bind all the others, but because each partner is the agent, not the master, of the other partners. The power to terminate partnership agreements at will arguably gives each partner a negative form of control over the business. But making each partner liable to file a separate report for each acquisition by the partnership seems excessive in view of the Commission's conclusions about the limited kinds of activities that are normally undertaken through a partnership. Finally, it might be possible to determine from the allocation of powers in a partnership agreement who controlled a partnership. Unfortunately, given the many powers that might be allocated, it is difficult to formulate, in advance, which would be the most important powers for a particular enterprise. In any case, the staff declined to deem anyone in control of a partnership.

Taken together, these two concepts created the "partnership loophole." A newly-formed partnership with less than $10 million in assets (not counting assets to be used in making an acquisition) need not file a premerger notification before making an acquisition. Because the rules treat the partnership as its own ultimate parent entity, the assets of its partners are not counted in determining whether it meets the statutory minimum size-of-person criteria; therefore, its acquisitions will not be subject to the Act.

One caveat must, however, be mentioned. Section 801.90 of the premerger notification rules provides:

> Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction.

The Commission is investigating a number of acquisitions by newly-formed, minimally capitalized partnerships, to determine whether under this rule the Act was violated.

RESPONSE TO SENATOR HOWARD METZENBAUM'S QUESTION CONCERNING HOSTILE TENDER OFFERS.

The Federal Trade Commission does not compile statistics on all tender offers, and does not identify which offers are hostile. However, according to the Directorate of Economic Policy and Analysis of the Securities and Exchange Commission, there were 197 tender offers during 1986. Of these, 136 were treated as friendly by the target management, 51 were treated as hostile by the target management, and 10 were treated as neither friendly nor hostile by the target management.

Senator **Metzenbaum**. Thank you, Mr. Calvani.

Mr. Strenio.

Mr. **Strenio**. Thank you, Mr. Chairman. I also appreciate the opportunity to be here. I generally agree with the Commission comments that Commissioner Bailey has summarized for you this morning.

I would like to just briefly touch on two issues where I have a slightly different perspective and let my written statement provide greater detail for you.

The first issue is the waiting period for the $1 billion and up transactions. I agree, based upon my experience at the Commission, that size alone is not a reliable indicator of antitrust complexity, and for that reason I agree with the Commission's decision not to recommend an increased waiting period in this area, but not to oppose an extension provided that the use of additional time is purely optional.

However, I would also like to suggest for your consideration that if the subcommittee concludes that a change is warranted, that consideration ought to be given to whether a period shorter than 60 days would be sufficient for the purposes of providing additional review.

The second issue is regarding State attorneys general access to Hart-Scott-Rodino materials. I view this as a proposal that raises very complex policy issues. As my colleagues point out, there might be occasions where it could be demonstrated that making materials available to the State attorneys general for local law enforcement actions would not compromise the Commission's merger enforcement program.

On the other hand, such disclosure would not be costless. First, it might make companies more reluctant to continue the high degree of voluntary cooperation that the Commission currently receives and depends upon. Such an outcome could result in substantial harm to the pre-merger enforcement program.

In addition, even if disclosure were fully discretionary, it may prove very difficult for the Commission to formulate and implement standards for granting or denying requests for disclosure in a manner that does not appear to be arbitrary.

From my perspective, the FTC has a responsibility to provide vigorous and effective antitrust enforcement. Accordingly, before I can support a proposal, I have to satisfy myself that it would not hinder the Commission's ability to fulfill this mandate.

At this time, given the concerns I have mentioned, I think further study is required before reaching a conclusion on this proposal. I will continue to work both with the committee and the committee staff to reach a more definite position.

In any event, I agree with my colleagues that the proposal should be classified to state that disclosure would be at the Commission's discretion and that the Commission could only grant requests upon certification that the materials would only be used for law enforcement purposes and would be maintained in confidence.

I thank you again, Mr. Chairman. I look forward to working with you and all members of this committee.

[Statement follows:]

PREPARED STATEMENT

of

ANDREW J. STRENIO, JR.

COMMISSIONER

FEDERAL TRADE COMMISSION

Mr. Chairman and Members of the Subcommittee: I am pleased to be here today to discuss the proposed amendments to the Hart-Scott-Rodino Antitrust Improvements Act ("HSR") contained in S.431 and S.432.

The statement of the Federal Trade Commission ("Commission" or "FTC") submitted to you represents the views of a majority of the Commission. For the most part, I concur in those positions. Rather than repeat discussion contained in the Commission statement, I now would like to comment briefly upon two issues where my conclusions are somewhat different.

Waiting Periods for $1 Billion Transactions

Based upon my experience at the Commission, I think that size alone is not a reliable indicator of antitrust complexity. Therefore, I agree with the Commission's decision not to recommend this increase in the waiting period, but not to oppose the extension provided use of the additional time is purely optional. However, I would also like to suggest that if the Subcommittee concludes that a change is warranted, consideration should be given to a period substantially shorter than 60 days.

State Attorneys General Access

This proposal raises complex policy issues. As my colleagues point out, there might be occasions where need could be demonstrated and where making HSR materials available to state attorneys general for local law enforcement actions would not compromise the Commission's merger enforcement program. On the other hand, disclosure of Hart-Scott-Rodino materials would not be costless. First, enactment of Section 3 of S.432 might make companies more reluctant to continue the high degree of voluntary cooperation that the Commission currently receives and depends upon. Such an outcome could result in substantial harm to the Commission's premerger enforcement program. In addition, even if disclosure were fully discretionary, it may prove very difficult to formulate and implement standards for granting or denying requests for disclosure in a manner that does not appear to be arbitrary.

From my perspective, the FTC has a responsibility to provide vigorous and effective national enforcement of federal antitrust law. Accordingly, before I can support any proposal, I have to satisfy myself that it would not hinder the Commission's ability to fulfill our antitrust mandate. At this time, given the concerns I have mentioned, I think further study is required before reaching a conclusion on this proposal. I will continue to work with both Committee and Commission staff to reach a more definite position.

In any event, I agree with my colleagues that if the proposal is to be enacted, it should first be amended to clarify that disclosure would be solely at the discretion of the Commission or the Assistant Attorney General; and that Hart-Scott-Rodino materials could be made available only in the context of actual law enforcement matters.

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Senator **Metzenbaum**. I have some questions, but before proceeding to the questions, let me say to you that the Chair is particularly pleased at the insightfulness and the thoughtfulness that each of you has brought to the hearing.

It is interesting to me that some parts of the bill you support, some you want some clarification on, and some you have some problems with. That does not concern me in that it seems to me that there is an area to work together with the Commission in order to formulate a piece of legislation that you can be comfortable with and we can, because in the last analysis what we are really trying to say is we are trying to strengthen your position, not to weaken your position, and to do so without causing the American business community to be required to pay an unnecessary price. We are not looking to provide roadblocks for the normal progress of the free enterprise system.

I note that my colleague, Senator Heflin, has arrived. I did not know whether you had any opening statement, Senator.

Senator **Heflin**. No. I am just listening.

Senator **Metzenbaum**. Well, we are happy to have you with us this morning.

The bill I have introduced would make the antitrust review period for cash tender offers the same as for other mergers. A good example of a case where this was needed was the Socal-Gulf and Texaco-Getty mergers.

These mergers were structured as cash tender offers even though they were not hostile takeovers. The Socal-Gulf deal was valued at about $13.2 billion and Texaco-Getty was valued at $10.1 billion. Not only were these the largest mergers the FTC ever reviewed, they were the largest in U.S. history.

Yet, is it not the case that the law only guaranteed that the staff would have 10 days to review the merger after the requested information was furnished by the parties?

I guess you are sort of indicating—and I do not know whether or not the question is appropriate because as I see your position, you are saying that if the time will be extended, you are very comfortable with that, provided that the Commission has the right to shorten that period if you deem it advisable to do so.

Ms. **Bailey**. Yes, sir, that is correct.

Senator **Metzenbaum**. So that I do not think we are in disagreement on that because as I indicated, that is our intent to give you that absolute right to shorten the period as much as you want.

Ms. **Bailey**. That is correct with respect to the extension of the 60 days. Now, with respect to cash tenders, which those transactions were, first, if there is no problem with the Williams Act, then we support extending those times.

Senator **Metzenbaum**. If there is no problem with the Williams Act?

Ms. **Bailey**. And we now understand that there is no problem with the Williams Act, in any event, with respect to the post-second request period, so we do support that in any event.

Senator **Metzenbaum**. Thank you.

I understand that in the Socal-Gulf case, the FTC received 1,200 boxes of documents to go through, or about a million individual documents, and that you had to bring in more than 30 professional staff to go through all this material in a few days.

I am sure you did a great job under the circumstances, but I guess we all would agree that that is not a very reasonable way to proceed and that more time ought to be allocated, and I think we have already agreed that that should be given to you, provided it does not impinge on the Williams Act.

Ms. **Bailey**. Well, I think, Mr. Chairman, you are talking precisely about the situations where we have had some of our most strain, and those are in cash tender offers that are friendly, because in those cases there is no particular source of information as there might be in a hostile takeover where we could get information quickly in order to make an analysis.

Our problem is most complicate when it is a friendly takeover, particularly with friendly cash tender offers.

Senator **Metzenbaum**. In mergers of this kind, the staff is working and they are breaking their necks to try to get all the work done. How much time does the Commission itself have to review the staff proposals before being called upon to vote on them?

Ms. **Bailey**. Would you like to answer that?

Mr. **Calvani**. Commissioner Bailey has asked me to answer the question. I am not really sure why, but——

[Laughter.]

Mr. **Calvani**. Mr. Chairman, it varies radically. On some occasions we have staff documents in ample time to make a considered judgment. On other occasions, I think all of us would have liked to have had more time.

Also, when we refer to staff documents, there are numerous staff documents coming from various places, so we may receive a recommendation from one bureau on one day and a recommendation from another bureau four days later.

I really cannot answer your question in general because our experience ranges so widely, Mr. Chairman.

Senator **Metzenbaum**. Most of the matters coming before you involve friendly takeovers, not hostile takeovers. Is that not pretty much the case?

Mr. **Calvani**. Mr. Chairman, I do not have the numbers in front of me, but that is my perception.

Senator **Metzenbaum**. If it would be convenient, I would appreciate it if you could obtain the information for us.

Mr. **Calvani**. I would be delighted to submit for the record the actual numbers. Mr. Chairman, let me do so with one caveat. Many times, it is very easy for us to look at a transaction and characterize it as either hostile or friendly. There are a good number of transactions where it is very difficult to generalize and where the nature of the hostility will change during the pendency of the matter.

So it is not as simple as it might seem to just simply take transactions and to put them into a friendly or an unfriendly basket, but we will do as good a job as we can in responding to your question.

Mr. **Strenio**. Mr. Chairman, just on that point, I do have some preliminary information from 1986. This is very rough, but staff identified a total of 20 hostile takeover attempts in 1986, of which

10 were cash tender offers. That is a very rough figure from one year and we will certainly get more complete information for you. But for what that is worth, that is our preliminary information.

Senator METZENBAUM. Thank you.

Now, as I understand your testimony with respect to the partnership loophole, you favor closing the partnership loophole, but you want to do it by regulation. As I have already indicated, you have been on this problem since September of 1985. Now, you have issued a new proposed rule and you indicate that you might be able to put it into effect within three months, but the fact is that you might not be able to.

It seems to me that if we can come to some agreement, and I am not sure that we are in disagreement, that there might be much merit to just putting it into the law and let it be a finality.

If you issue a regulation, it is still subject to court challenge. True, legislation is also subject to court challenge, but a little lesser kind of challenge, as I see it, and probably less likelihood of a court challenge.

I am wondering whether or not we cannot work together to come to an agreement with respect to the partnership loophole question and possibly even pass it. It seems to me that this is an odious situation that has occurred; that we ought to get rid of it immediately; that today, tomorrow or the next day there could be another development with respect to that partnership loophole, and the faster we can clean it up, the better served the country would be.

Mr. Calvani, were you getting ready to respond?

Mr. CALVANI. Yes, Mr. Chairman, I would be delighted to, and indeed I welcome that question. First, let me say that in the event that the Commission does not act expeditiously at this point in time and in the event that we do not have a rule in place, I think that the Congress would be well advised to take matters into its own hands. Hopefully, that will not occur.

Second, it seems to me that entrepreneurial creativity being what it is, it will likely produce new loopholes with reference to whatever rule we might devise or whatever rule the Congress might enact into statute. We have seen that in the past.

I think all of us could probably look at the proposed rule that we have drafted and the proposed rule or statute that you have drafted, sir, and in short order come up with some loopholes to it. There is not a perfect solution.

I think the regulatory solution is a better one because when the next entrepreneurial creativity creates the next loophole, we will, I hope, be better able to speedily close that loophole than we would if we had to enact an amendment to a law enacted by the Congress.

So I think there is a greater degree of flexibility.

With reference to the end result, I can see no reason why this committee and its staff could not work with the Commission in devising the best language, whether it be for statute or for enactment by regulation, one that accommodates the legitimate interests of all of the parties.

I think if we can do that and then promulgate it by regulation, we will have the appropriate fix, and we will also have the flexibility that if next year some creative entrepreneurs have figured out yet another loophole, we will be able to more speedily close it.

Senator METZENBAUM. I think one of my concerns, Mr. Calvani, is that you have been on this issue about 18 months. Ms. Bailey says that you hope to get the matter resolved within 3 months. But sometimes the hope is not quite equal to the fact, and it seems to me that if you and we are in a race to see who can get the job done faster and if our action causes you to move even more rapidly, so be it.

Now, I think there is a little bit of difference.

The rule you proposed in the last few days is similar to S. 431, the bill I introduced, but with one major exception. You say you should count the size of the partners in determining if a premerger filing should be made if a partner is entitled to receive more than 50 percent of the profits of the partnership or more than 50 percent of the assets if the partnership is dissolved.

Let me start off by just saying, as a lawyer, I think that is a very, very nebulous kind of definition because I could very well see many arguments being made that the preferred stock comes in, that the convertible debentures come in, that a different kind of class comes in; that there is a claim outside that may be worth "x" dollars or "y" dollars, and I think that does create some problems from a legal standpoint.

My bill says that a partner should be counted if he or she has more than a 50-percent interest, but it also says that you should take into account the assets of any general partner. Let me give you an example to see how your rule would work.

Assume Exxon, Mobil and Texaco formed a partnership to take over Socal. Exxon, Mobil and Texaco are all general partners and split everything one-third, one-third, one-third. Would that partnership have to report under your rules?

Mr. CALVANI. Mr. Chairman, I am delighted to answer that question. I obviously have a leak on my staff because that is a hypothetical that I posed to my own staff 2 days ago.

Senator METZENBAUM. We will have the FBI, the CIA and the NSA immediately check into it. [Laughter.]

Mr. CALVANI. I think you have identified what is a problem with the proposed fix under our rule, but let me make two points with reference to it. First of all, our rules currently provide that a transaction that is structured for the purpose of avoiding the regulations—in other words, very creative loophole maneuvering that is structured for the purpose of avoiding the regulation—is deemed to be a violation, such that very creative lawyering to get around the regulations is, in our view, a violation of the law.

Second, while the hypothetical you pose would not be caught within the ambit of our proposed regulation, we have not to date, and I have asked the staff to run this down, seen a transaction that poses anti-competitive problems that resembles this law professor's hypothetical.

I think you have identified a problem. It is my understanding, and I do not want to belabor the committee, but we would be delighted to submit it for the record, that there are similar problems associated with the statutory fix.

A couple of them are that at least under some of the proposals—and I think this may be true of the bills that are currently before this committee—is that some of them at least would take into account leveraged buy-outs, of which there are large numbers across this country every year.

Senator METZENBAUM. I have some other questions with respect to Goldsmith's attempted takeover of Goodyear where there were 6 partners—no single one of the partners had over 50 percent of the profits—and the partnership loophole in connection with the attempted takeover of Diamond Shamrock by Mesa, controlled by Boone Pickens. They both are in the same business area.

I think that the situation warrants very prompt action on the part of your staff people and mine to come to an agreement as to how to deal with this problem, whether it be legislatively or by regulation, because I do not think we are in disagreement with respect to the objective. I think we are in disagreement with respect to the modus operandi.

Would you agree with that, Mr. Calvani, Ms. Bailey, and Mr. Strenio?

Ms. BAILEY. Yes.

Mr. CALVANI. Yes.

Mr. STRENIO. Yes, sir. If I might just add on that point, as part of the FTC proposal that is going out for publication, we are asking for comments on a proposal that the American Bar Association has submitted which would have a much lower threshold trigger, a 25-percent level, that would touch off the reporting requirements, so that we are currently looking at a number of alternatives that would possibly address your concern in very short order.

Senator METZENBAUM. Senator Heflin, do you have any questions?

Senator HEFLIN. Yes. Why was the partnership exclusion originally made? Was there a rationale or a justification for it?

Mr. CALVANI. Judge, I do not have a ready answer. That was prior to my coming to the Commission. It was the subject of some staff interpretations of rules. We would be delighted to consult with people that were here at the time and to come up with a more detailed answer for you, but I am personally not able to answer the question.

Senator HEFLIN. Well, now, another question I have is, for example, a law firm. Under the partnership arrangement—and, of course, this is a professional corporation that attempts to merge; say a New York firm merges with a Philadelphia firm.

Would this mean that that law firm, under your proposal and his legislative proposal, would have to file these pre-merger matters with the FTC?

Would doctors, other professional groups, be involved in this sort of a situation; and if so, would the approach towards that be different from a business? Would such a merger involve the question of anti-competitiveness of doctors, law firms, relative to their types of business in particular localities, with branch offices in certain places?

It seems to me that this legislation is probably very sweeping in its attempts to cure this partnership loophole and may bring within its jurisdiction or within the gambit of the legislation many areas that it was not intended to.

Mr. CALVANI. Judge, we have tried to draft the regulation so that it is not over-encompassing. With reference to your specific hypothetical, two partnerships consolidating in that fashion, it is my understanding that because they are partnerships or because they were lawyers would make no difference.

However, you and I should have the good fortune to be members of law firms that would pass the statutory threshold requirements in terms of assets and sales.

Ms. **Bailey**. Yes. One of the two firms involved would have to have assets in excess of $100 million.

Senator **Heflin**. Now, does this mean that the assets of the partner or just the partnership assets would be involved?

Ms. **Bailey**. The assets of the partnership.

Senator **Heflin**. Just limited to the assets of the partnership.

Ms. **Bailey**. You missed the part where I said that discussion of the technicalities of these provisions was mind-bending. Just a moment. [Laughter.]

Senator **Heflin**. You do not look at the assets of the partners.

Ms. **Bailey**. May I ask a member of our staff from the Hart-Scott-Rodino pre-merger notification program to answer the question?

Senator **Metzenbaum**. I think, actually, that is the objective of your regulation and our proposal that you do look at the assets. Is that not correct?

Ms. **Bailey**. Yes.

Senator **Heflin**. Then a wealthy lawyer or doctor who has assets in excess of $100 million, while the law firm has smaller assets would come within the gambit of the——

Ms. **Bailey**. Only if that partner controlled it.

Staff of FTC. Senator, under our proposed rule, the assets of the partners, the individual partners, would only be included in circumstances where the individual partner was deemed to control the partnership.

Then you would add both the controlling partner's assets and the assets of the partnership itself. Otherwise, the individual assets of the partners would not be included.

Senator **Heflin**. You do not think your language is comprehensive to exclude all wealthy doctor arrangements, do you?

Staff of FTC. I would have to know more before I could answer that.

Senator **Heflin**. Well, I think that the rule may have some sweeping aspects that need to be studied very carefully rather than moving on the thing. Sometimes your cure takes in other things that may cause other problems. I am just trying to avoid any problems that might arise.

That is all I have.

Senator **Metzenbaum**. That lawyer with $100 million in assets ought to quit practicing anyhow.

Senator **Heflin**. Well, I do not know. How about a Senator who has $100 million? [Laughter.]

Senator **Metzenbaum**. If I know of a Senator who has $100 million, he ought to probably quit, too. [Laughter.]

Thank you very much. Let me conclude by saying we look forward to working with you. We feel that your appearance here today is an indication of your willingness to do that.

We are anxious to move forward promptly, if we are going to move forward at all, and I think that we are, and I hope that if nothing else that our action be a prod upon you to cut the 3 months down to 2 months or to 45 days, or whatever the case may be.

We think that the loophole is a problem in the economy today, and I am not particularly concerned as to whether it is resolved or solved by regulation or by action on our part. I just want the loophole closed. I think it is an odious one.

Thank you very much.

Senator HEFLIN. Mr. Calvani, if you would, get your staff to give us the rationale for the original exclusion pertaining to partnerships.

Mr. CALVANI. Judge Heflin, we will be happy to get that to you expeditiously.

Senator METZENBAUM. Mr. Calvani, I also might say to you that you had indicated that you and I had been in disagreement a number of times and that today we are pretty close to being in agreement, and I just want to tell you that I would defend in every possible way your right to have been wrong in those instances. [Laughter.]

Mr. CALVANI. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

Our next panel is Leroy Zimmerman, Attorney General of the State of Pennsylvania, and Robert Langer, Assistant Attorney General, on behalf of Joseph Lieberman, Attorney General, State of Connecticut.

Mr. Zimmerman, Senator Specter has advised us that he really wanted to be with us today, but by reason of another commitment could not be here. He wanted me to let you know that fact.

Mr. ZIMMERMAN. Thank you, Mr. Chairman.

Senator METZENBAUM. Would you please proceed, Mr. Zimmerman?

STATEMENT OF A PANEL CONSISTING OF LEROY S. ZIMMERMAN, ATTORNEY GENERAL, COMMONWEALTH OF PENNSYLVANIA, AND ROBERT M. LANGER, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF JOSEPH I. LIEBERMAN, ATTORNEY GENERAL, STATE OF CONNECTICUT

Mr. ZIMMERMAN. Mr. Chairman, I take it that my complete statement will be made a part of the record, so that I will try to summarize within the time constraints that you have imposed, but I would request that my statement——

Senator METZENBAUM. Your entire statement will be included in the record, as will yours, Mr. Langer.

Mr. ZIMMERMAN. Mr. Chairman, thank you for this opportunity to testify on behalf of the Commonwealth of Pennsylvania. My fellow attorneys general and I applaud your decision to examine the Federal merger review process which we believe is seriously deficient.

We are particularly gratified that you have asked for comments from the States, as one of the greatest deficiencies in the current review process is its failure to accommodate the States' vital interest in mergers. That deficiency, while rooted in the language of the decade-old Hart-Scott-Rodino Antitrust Improvement Act, has emerged as a significant problem only in recent years.

Historically, State attorneys general seldom had occasion to actively intervene in merger cases, despite our legal authority to do so. Aggressive Federal enforcement policies made State action unnecessary.

However, as Federal agencies have become more selective in their enforcement actions, attorneys general are finding it more frequently necessary to act to protect the economies of our individual States.

The current merger review process works to thwart our efforts in two major ways. First, it fails to meaningfully include State participation. Second, it permits the near total absence of accountability by the two Federal antitrust agencies responsible for merger decisions.

The deliberations of the Federal Trade Commission and the United States Department of Justice are conducted really behind a one-way mirror through which neither the public nor the States can see. There is no system of checks and balances to guard against imprudent decisions.

Either agency can make decisions which monumentally affect a State's economy without any obligation to address that State's concerns.

The Federal agencies can, and do, secretly negotiate merger approval agreements, and they seek public comment only after the deal has been struck. In other cases, the agencies decide not to act but tell no one, and the parties' announcements that the merger has been consummated serves as the first official notice that the Federal government does not oppose it.

The present merger review process, in short, treats the States really as spectators, not participants, and therefore stands as an obstacle to any State that attempts to participate. I speak from experience.

When Texaco announced its intention to acquire Getty Oil Company, we in Pennsylvania began examining the effect the merger would have on the Commonwealth. Now, since we were deprived of access to Hart-Scott-Rodino filings, it was not an easy task.

However, working with other States, we were able to develop information which convinced us that the merger would be anti-competitive, and joined by 21 other attorneys general, I filed extensive comments stating our concerns.

Not until after the merger was approved did I hear back from the FTC. They sent me a letter acknowledging receipt of our comments, and to this day I really cannot tell you what consideration the FTC gave to the formal comments of almost half the attorneys general of this Nation.

Now, perhaps the FTC had information that obviated our concerns, but, of course, I do not know that either. The States, in an effort headed by Connecticut, sued for access to FTC information, but the FTC fought disclosure and we lost.

Last year, Pennsylvania became concerned about the proposed acquisition of Associated Dry Goods by May Department Stores. The only two remaining traditional department store chains in the entire Pittsburgh region were owned by those two multi-billion-dollar holding companies.

Now, the devastating loss of competition that would result was obvious. Rather than trust the FTC to address our concerns, we in Pennsylvania, the Office of the Attorney General together with the city of Pittsburgh and the county of Allegheny, decided to fight the battle directly.

We sued to stop the merger and succeeded in forcing divestiture of one of the Pittsburgh chains, thereby preserving competition. While successful, our effort was extremely costly both in time and in money. As in Texaco-Getty, much of our effort was devoted to gathering on our own information that already was on file with the FTC.

Now, based on these firsthand experiences with the current merger review process, I do endorse the amendments under consideration, particularly the provision in Senate Bill 432 which would permit confidential disclosure to State attorneys general of that information which companies are required to provide in their Hart-Scott-Rodino filings.

I would respectfully urge the committee to consider four additional suggestions to better enable the States to protect their economies from anti-competitive mergers. First, disclosure to States should be mandatory, not permissive, as the amendment is currently drafted.

Second, the Federal agencies should be required to give notice upon request to State attorneys general of all time extensions and waiting period deadlines so that the States know how much time they have to act.

Third, States should have access not only to the material which the merging parties are required to file, but also to material which the parties choose to file.

Senator METZENBAUM. Mr. Zimmerman, wind up, please; your time has run over.

Mr. ZIMMERMAN. For instance, companies sometimes submit position papers on key issues of law and competition in an effort to influence the agency's decision. The States should have access to such documents.

Fourth, the FTC and the Justice Department should be required to provide the States with certain internal work products, particularly recommendation memoranda submitted to their executives at the final decision level. Access to such information would, of course, be premised on a certification of confidentiality.

Senator METZENBAUM. Mr. Zimmerman, I am going to have to cut you off.

Mr. ZIMMERMAN. Thank you very much, Mr. Chairman.

Senator METZENBAUM. Thank you. Your entire statement will be included in the record.

[Statement and response to questions follow:]

STATEMENT OF PENNSYLVANIA ATTORNEY GENERAL

LEROY S. ZIMMERMAN

before the

ANTITRUST SUBCOMMITTEE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

INFORMATION SHARING BY FEDERAL

MERGER REVIEW AGENCIES

WITH STATE ATTORNEYS GENERAL

FEBRUARY 26, 1987

Mr. Chairman and members of the Subcommittee, the federal merger review process is seriously deficient, and I am gratified that this Subcommittee has undertaken a review of it. While the Hart-Scott-Rodino Antitrust Improvements Act of 1976 was a step forward, judged against a decade of experience and the impact of changing federal agency enforcement standards, that statute does not meet current needs.

States have a vital interest in mergers. Whatever effect a merger may have nationally, it will likely have a more severe impact on the economy of a particular state or states. As the chief law enforcement officer of Pennsylvania, I have the authority to bring actions under the antitrust laws. Under those laws, I am authorized to protect the economy of Pennsylvania against anticompetitive mergers, but it is my experience that I am limited in so doing by reason of the federal merger review process.

Two serious problems in the federal merger review process are (a) the failure to meaningfully include state participation and (b) the absence of accountability by the two federal antitrust agencies responsible for merger decisions. The deliberations of the Federal Trade Commission (FTC) or the United States Department of Justice (Justice Department) are conducted behind a one-way mirror, through which neither the public nor the states can see. There is no system of checks and balances to guard against imprudent decisions. Yet, neither agency has a monopoly on merger law expertise or the wisdom of any merger. Either agency, and worse yet, a few staff persons within a single agency, can make or influence major, if not monumental, decisions affecting a state's economy with little or no concern for that state's views.

Under present statutory provisions, the federal agencies sometimes secretly make merger approval agreements with one or both of the merging parties, and only then announce that agreement for public comment. Other times, the agencies decide not to act, the decision is not announced, the deadline runs, and the merger occurs.

I endorse the amendments, particularly the provision in Senate Bill 432 which permits confidential disclosure to State Attorneys General of information and documentary material required as part of a Hart-Scott-Rodino merger filing. However, I believe these amendments do not go far enough in providing state law enforcement agencies access to information available to the federal agencies and needed by the states to make informed decisions concerning a merger's effect on competition.

The opportunity now provided for public comment is entirely unsatisfactory. No part of the process provides State Attorneys General access to documents filed with the federal agencies by the merging companies. This lack of access seriously impedes, and most often will fatally impair, a state's ability to evaluate independently the competitive impact of a proposed merger. Even if the only action a state intends to take is responsible comment to a federal agency about a merger, that modest step is frustrated without state access to critical information.

Pennsylvania's experience in opposing two mergers demonstrates how the present federal review process frustrates and hampers state participation. I relate this experience so as to make meaningful suggestions about the amendments you are considering.

I. TEXACO/GETTY MERGER

About three years ago, Texaco sought to acquire Getty Oil Company. Our office wrote extensive comments, joined by some 20 State Attorneys General, opposing the proposed merger. These comments were filed with the FTC. Despite no access to Hart-Scott-Rodino filings, we worked hard and were able to secure enough information from other sources to prepare the comments. After the merger was approved by the FTC, I received a letter acknowledging receipt of our comments. There was no exchange of views.

This one-way commentary process is highly unsatisfactory. There is no opportunity for dialogue with either the FTC or the Justice Department. There is no allowance for mutual exchange of ideas between the states and the federal agencies. For example, the states raised the issue of the need for competition in the search for new oil, since proven domestic reserves are declining and there have been two major crude oil crises since 1970 related to the instability of foreign sources. We made the point that the Texaco/Getty merger, in eliminating Getty and transferring Getty's substantial oil reserves to Texaco, eliminated exploration by Getty and created a disincentive to explore by Texaco. We supported our statement of concern with statistics and other facts. We do not know to what extent, if at all, the exploration issue was considered.

As this example demonstrates, we can only comment and then wait for action by the FTC or the Justice Department. We have no way to know with any degree of assurance what particular issues concern the FTC or the Justice Department. We can only identify issues we think are important, comment, and wait.

During and after the time of FTC consideration of the Texaco/Getty merger, we joined with Connecticut and other states in an effort to obtain merger information from the FTC. We requested these documents so we could analyze the merger with the same information the FTC had. The FTC refused access. The Connecticut Attorney General headed an unsuccessful separate legal action to obtain information.

We continue therefore to comment in the dark on merger proceedings because this is the process now provided by federal merger review statutes and the federal agencies.

II. MAY DEPARTMENT STORES/ASSOCIATED DRY GOODS MERGER

More recently, in late June 1986, we became aware that May Department Stores Company, a large -- $5 billion in sales -- New York Stock Exchange retail store holding company, was interested in acquiring Associated Dry Goods, a $4 billion retail store holding company.

These are coast-to-coast companies. They owned many chains of stores and thousands of individual stores. Some names may be familiar to you. The chains included 45 Lord & Taylor's nationwide, 110 Caldor discount stores in the Northeast and Mid-Atlantic states, Famous-Barr in St. Louis, the L. S. Ayres stores in the Mid-West, Goldwaters' in New Mexico and Arizona, the May D&F stores in Colorado, and the J. W. Robinson stores in southern California.

Our concern was the reduction in competition among department stores in and around Pittsburgh. Pittsburgh is in the center of populous and urbanized Allegheny County. The city and county economies are closely linked.

At the time the merger was announced, only two traditional department store chains, Kaufmann's and Horne's, remained in the Pittsburgh-Allegheny County area. The merger, by eliminating one of these department store chains, would have eliminated competition between traditional department stores altogether.

Our efforts at first were only to join with city and county officials in meeting with the FTC staff and with four FTC Commissioners. This again was a one-way proposition. The FTC released no information to us. Nor were we told about extensions of time for concluding merger review, or when waiting periods would expire. As time passed, we perceived that the FTC was having difficulty determining whether the merger was anticompetitive.

Information necessary to analyze the merger, at least for the purpose of determining preliminarily whether to oppose it, was independently obtained by the City of Pittsburgh, Allegheny County, and my office. Economists and other experts were retained. Independent economic and legal research was undertaken. This time-consuming and expensive endeavor could have been minimized had the FTC provided access to the information we needed.

By the end of August, two months later, we knew we could not count on the FTC. This does not suggest that the FTC was not actively analyzing the merger. But it was uncertain whether the FTC would act. We were working against an October 3 deadline, the date of May's and Associated's shareholders' approval meetings. Accordingly, at the end of August, not knowing whether the FTC would act nor the deadline date by which the FTC had to act, my office made a commitment to the City of Pittsburgh and Allegheny County to join in a suit opposing the merger.

On September 3, 1986, we filed a complaint for a preliminary injunction as well as discovery papers and subpoenas. It was only after costly independent research and filing suit, that we finally obtained the premerger notification materials filed with the FTC by May and Associated. Even then we got them from May and Associated, not from the FTC.

Following an intensive discovery and trial preparation period, a settlement was reached between the parties on the eve of trial. The settlement called for divestiture by May of the Horne's department store chain, then owned by Associated Dry

Goods. Because we negotiated for the divestiture of the entire Horne's department store chain, anticompetitive threats existing in Erie, Pennsylvania, and in Youngstown, Ohio, where both Kaufmann's and Horne's stores were located, were also defeated. The settlement, which was everything needed to preserve competition in Pennsylvania, was announced in Pittsburgh by the Chief Judge of the United States District Court for the Western District of Pennsylvania, three weeks to the day after the complaint was filed.

We beat the October 3 deadline. The Federal Trade Commission had not acted by then and subsequently closed the file.

As a postscript, May announced in November 1986, it was selling the Horne's chain to a management group. That sale was in compliance with the terms of the settlement we secured. Thus, competition between traditional department stores in both western Pennsylvania and Youngstown remains intact.

III. SUGGESTIONS FOR IMPROVING THE HART-SCOTT-RODINO PREMERGER REVIEW PROCESS

Because of our experience with Texaco/Getty, May/Associated, and other mergers, I respectfully offer four suggestions to improve that merger review process.

First, I reiterate my support for the sharing of Hart-Scott-Rodino materials by the FTC and the Justice Department with State Attorneys General who agree to confidentiality as provided by the proposed amendment. However, I believe the disclosure to state law enforcement agencies should be mandatory and not permissive as the amendment is currently drafted.

Second, it is important that the statute provide for State Attorneys General to be given notice by the federal agencies of all extensions of time and waiting period deadlines, upon request, so that the states are not left to guess how much time is left for the FTC or Justice Department to act. If a state is to challenge a merger, as we did with May/Associated, it must do so before the merging companies take final action to consummate the merger. This can occur as soon as a waiting period or extension deadline expires. If a state guesses wrong, and the merger is consummated before effective action can be taken, the equities will have changed, and it may be impossible to "unscramble the eggs." By building into the federal review process the simple requirement that states, upon request, be notified of such deadlines, the states will be better able to decide whether, and when, they must challenge an anticompetitive merger.

Third, apart from materials required to be filed by the merging companies, all other relevant information or documents provided by the merging companies, voluntarily or otherwise, should be provided to the states. As has happened, merging companies sometimes submit a position statement to the FTC or the Justice Department to convince the agency not to challenge the merger. These position statements express the merging parties' views on relevant legal issues and the proposed merger's effects on competition. Clearly, this information would be valuable to a state trying independently to assess a merger's effects.

Fourth, the FTC and the Justice Department should be required to provide the states with certain internal work product, particularly recommendation memoranda prepared by staff attorneys or economists which analyze issues such as relevant markets or the merger's effect on competition. This suggestion does not include preliminary work product, but does include those recommendation memoranda submitted to final executive decision levels, such as those to the FTC Directors of the Bureaus of Economics or of Competition. Release of such information would significantly help a state decide whether to challenge the proposed merger.

Release of any such memoranda by the federal agencies would, of course, be premised on a certification of confidentiality by a requesting State Attorney General. Considerable work and thought goes into FTC and Justice Department staff recommendation memoranda. There is no reason to require the states to engage in start-from-scratch, duplicative, legal and economic research. Concerned states should also know what the federal antitrust agency considers to be the major issues and relevant information. There is no reason to keep secret from the states that federal agency work product which is necessary to a constructive mutual consideration of complex merger review questions, especially when a merger has the potential for major economic impact as with the Texaco/Getty and May/Associated mergers.

These recommendations are consistent with concepts of federalism and steps taken by the federal administration and Congress to promote state economic autonomy. The states cannot be called upon to accept greater responsibility for economic self-determination and then be denied the necessary economic information to carry out that responsibility in the critical area of merger analysis.

The federal government and the states should have the same interests in protecting the public interest in merger cases. Information sharing provides the basis for useful dialogue between the states and the federal agencies. The review process should allow us to work together.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
March 17, 1987

1. Attorney General Zimmerman, in your testimony you recommend that this legislation be amended to require the FTC and Justice Department to share certain internal work product with the states. As I am sure you are aware, such material is normally privileged. Is there any precedent in federal law for requiring an agency to engage in this sort of work product sharing with states?

RESPONSE: The answer is yes. Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b), requires the Attorney General of the United States to make available, upon request and to the extent permitted by law, "investigative files or other materials" to state attorneys general considering action under the federal antitrust laws. My Antitrust Section has on numerous occasions received internal work product from the Justice Department when it has made a 4F(b) request.

Similarly, while section 6(f) of the FTC Act, 15 U.S.C. § 46(f), does not expressly provide for the release of internal work product as does 4F(b), the Federal Trade Commission had a long-standing policy up to 1984, of releasing as a matter of discretion and on a confidential basis, under section 6(f), most internal FTC documents as well as materials submitted by persons or companies under investigation. In 1984, however, the FTC and two circuit courts reversed this policy as it related to Hart-Scott-Rodino premerger materials.

Finally, there are other instances where federal agencies are permitted to disclose privileged information to the states for law enforcement purposes. For example, Rule 6(e) of the Federal Rules of Criminal Procedure was recently amended to permit disclosure of grand jury materials to state law enforcement officials where there may be a violation of state criminal law.

2. How would the changes in the law you are seeking have benefited you in your eventually successful efforts in the May Department Store/Associated Dry Goods merger litigation? How would these changes contribute to a more efficient use of federal as well as state resources?

RESPONSE: In the May/Associated merger, the Commonwealth, the City of Pittsburgh, and Allegheny County had 16 attorneys at various points working on the case (equivalent to 8 attorneys on a full time basis) and in addition, Pittsburgh and Allegheny County spent over $250,000 in out of pocket costs. A considerable part of this amount, if not most of it, would have been saved if we had the benefit of the FTC's internal work product and had access to the same information as the FTC had, prior to filing suit. We may even have been able to use this information with the information we gathered independently to convince May to divest Horne's without filing suit.

In addition, because the FTC could not or would not tell us of extensions of time and waiting period deadlines, we had to guess at these deadlines and then time the filing of suit based on these guesses. If a state guesses wrong, and the merger is consummated before effective action can be taken, the equities will change quickly and it will be almost impossible to "unscramble the eggs." By sharing information on extensions and deadlines with the states, the federal agencies minimize the chance that a state will rush to file a suit before all the facts have been thoroughly analyzed.

Finally, by providing state attorneys general with access to Hart-Scott-Rodino information, the federal agencies can have the benefit of a state's analysis which may save federal resources. States understand the local and regional effects of mergers better than federal agencies can be expected to. However, states cannot effectively cooperate with the federal agencies without access to the information which the federal agencies have. As long as the dialogue is one way only, neither side can benefit fully from the information and analysis they have to offer each other.

3. What, if any, experience have you had that leads you to conclude that a return to the prior practice of discretionary disclosure by the FTC and Justice Department of pre-merger material is insufficient and that legislation is needed that mandates that the agencies share information with the states?

RESPONSE: Prior to 1984 when the FTC changed its policy of providing access to Hart-Scott-Rodino materials, Pennsylvania had never requested these materials in a merger case, although other states had. However, Pennsylvania has the right to initiate litigation to challenge a merger which it considers anticompetitive and harmful to its economy. When such mergers threaten, neither Pennsylvania nor any other state should have to rely on the discretion of a federal agency to obtain essential documents. This is especially true where it is likely that a state may take action contrary to the federal agency's position. For example, in the May/Associated Dry Goods merger, the FTC may have been hesitant to provide us with information, even if it was within its discretion, when the FTC knew Pennsylvania was likely to challenge the merger and it was not. With discretionary powers, the federal agencies can deny states access to vital information. This is intolerable where the states have the responsibility to protect their economies, need the information to do it, promise confidentiality, yet still do not have the right of access to that information.

CSH/las/1590A

Senator **Metzenbaum**. Mr. Langer.

Mr. **Langer**. Thank you, Senator Metzenbaum. I appear here today on behalf of Attorney General Joseph I. Lieberman, Attorney General of Connecticut. Unfortunately, he could not be here today due to a scheduling change.

I am here to support amendments in S. 432 to require or permit disclosure of Hart-Scott-Rodino pre-merger notification materials to State attorneys general. I should add that I am and have been Assistant Attorney General in charge of antitrust and consumer protection for the State of Connecticut for the past 7 years and have been involved in antitrust enforcement for 14 years.

Our statement deals with the historic cooperative relationship between the Justice Department, the Federal Trade Commission, and State attorneys general in all areas other than Hart-Scott-Rodino filings.

I was privileged to litigate *Lieberman* v. *Federal Trade Commission* in the Second Circuit on behalf of several other States in attempting to obtain a favorable determination.

What I came away with in Lieberman and in reading the Fifth Circuit decision in *Mattox* v. *FTC* was great difficulty on the part of the courts in determining what Congress intended in 7A(h) of the Hart-Scott-Rodino Act.

The court in Lieberman made a very interesting statement. It said, "We find the language of Section 7A(h) not unambiguous, the legislative history sparse, and the administrative interpretation of debatable if not doubtful usefulness. But in light of the Congressional purpose we divine to be at work, we come down with the Fifth Circuit."

Mattox said the same thing. They tried to divine the will of Congress, and we believe they were incorrect, but we are here today hopefully to overcome that. I think the statute clearly needs clarification, and we have submitted along with our testimony on behalf of the attorney general the brief which we originally filed in the Second Circuit on behalf of the States.

The second comment deals with, I think, a clear misunderstanding on the part of the courts as to what State attorneys general want to do with the information. There is a comment that was specifically out of the *Lieberman* case that says, "We doubt if Congress would have intended to have the staffs of 50 State attorneys general sitting as oversight committees, reacting to Commission or Justice Department decisions whether to block large-scale mergers of national or international significance."

It misunderstands the function that State attorneys general perform. We have traditionally been involved in national competition policy. Some of us have substantial staffs, but none of us have the type of Bureau of Economics which the FTC has.

Considering the inordinantly short time periods involved and the difficulties involved in unscrambling the egg, as the term is used, the need for this material, as an antitrust litigator, is absolutely critical.

Most importantly, it is clear to us, at least, that Congress never intended that national merger policy be given totally and solely to the Justice Department or the Federal Trade Commission.

In fact, in the Hart-Scott-Rodino Act, 7A(i)(1) specifically says "that any action by the FTC or by the assistant attorney general, or failure on their part to act, shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or under any other provision of law."

We read that to say that Congress never intended, as the Second Circuit seemed to intimate, that State attorneys general are divested of authority to deal with these particular mergers, and I hope that the Congress will reaffirm the position that we believe was intended in 7A(h) that we are not part of the public, as your amendment in S. 432 says.

The last comment I want to make deals with whether or not, as the FTC says, we should be limited to getting the information for law enforcement purposes and, as I read it, in litigation.

I am very appreciative that Commissioner Bailey made the statement on behalf of the Commission that they now support access by State attorneys general to H-S-R materials. I think, quite clearly, that comment by a State attorney general on a consent order proceeding is clearly a law enforcement purpose of a State as much as litigation that we would institute in a State court or in Federal court.

To the extent that the FTC would not want us to get access to that information for comment purposes, I think it is deleterious to the economy and to competition generally. We have something to say.

I think Gene Way, who is the assistant to Attorney General Zimmerman, did a remarkable job in the Texaco-Getty comments without access to the H-S-R filings. I think it is absolutely critical that we get access for comment purposes.

There is no fear that we would give that information out even in the context of a consent order proceeding. Redaction or elimination of any confidential or trade secret information is used by the FTC now in any type of competitive impact statement it issues and publishes in the Federal Register.

As it did with Texaco-Getty and Socal-Gulf, they put in a little footnote that will say we are basing this upon confidential information and we cannot tell you what it is. We just want to be in that same position. We do not want to be in a better position than they.

Thank you very much.

Senator METZENBAUM. Thank you, Mr. Langer. Your entire statement will be included in the record.

[Statement follows:]

STATE ATTORNEY GENERAL ACCESS TO HART-SCOTT-RODINO PRE-MERGER NOTIFICATION DOCUMENTS
S.432

JOSEPH I. LIEBERMAN
CONNECTICUT ATTORNEY GENERAL

FEBRUARY 26, 1987

On behalf of the National Association of Attorneys General, I submit this testimony in support of Senate Bill S.432.

This Bill would amend Section 7A(h) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("H-S-R Act"), 15 U.S.C. § 18a(h), to permit access to premerger notification materials to State Attorneys General for use in law enforcement activities. Passage is necessary in order to remove the impediment caused by the interpretation of Section 7A(h) rendered by Federal Trade Commission and affirmed by the federal courts in Lieberman v. FTC, 771 F.2d 32 (2d Cir. 1985) and Mattox v. FTC, 752 F.2d 116 (5th Cir. 1984).

State Attorneys General are authorized to enforce provisions of both federal and state antitrust laws. Under federal antitrust laws, State Attorneys General, in their common law parens patriae capacity, possess the right to institute suit to enjoin antitrust violations which threaten the general economy of their states. Additionally, many State Attorneys General have authority to proceed under their own State laws. For example, I am the administrator of the Connecticut Anti-Trust Act, Chapter 624 of the Connecticut General Statutes, and under Section 35-32 of the Connecticut General Statutes, I am authorized to enjoin unlawful mergers in violation of Section 35-26 of the Connecticut General Statutes.

It is the articulated policy of the Federal Trade Commission, as stated in its Rule 4.6, "to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions." 16 C.F.R. § 4.6. In furtherance of this policy, the Commission has provided that information in its possession which is needed by a State to assist in its antitrust enforcement may be requested from the Commission pursuant to Commission Rule 4.11(c). 16 C.F.R. § 4.11(c).

Historically, the Commission's policy has been to release to State Attorneys General, as a matter of discretion, most internal

FTC documents as well as material submitted by persons or companies under investigation. In the past, such disclosures were made with the firm proviso that all confidential material would remain nonpublic.

In May, 1980, Congress ratified the Commission's implicit authority to make these nonpublic disclosures--Pub. L. No. 96-252, 94 Stat. 374 (1980) -- but amended the FTC Act, 15 U.S.C. § 46(f), to make clear the limitations on the Commission's authority and to impose express requirements concerning the confidentiality and use of any documents disclosed that contained trade secrets or confidential commercial or financial information obtained from outside the Commission.

Following these guidelines, in February, 1984, I requested access to materials submitted to the FTC by Texaco and Getty under the premerger notification requirements of the H-S-R Act. State Attorneys General from Minnesota, Pennsylvania, Rhode Island, Massachusetts, Texas and California made contemporaneous requests for access to premerger notification materials submitted to the FTC in connection with this merger and/or the Chevron-Gulf merger. In compliance with Rule 4.11(c), each state certified that all documentation received would be used for official law enforcement purposes only, and that confidentiality would be maintained.

The Attorneys General requested the documentation because it would have provided immeasurable aid to our abilities to analyze the competitive impact of each merger, and was essential to our determination as to whether to initiate or continue any administrative or judicial action or proceeding under the antitrust laws of our respective states or of the United States in a manner which differed in any material respect from that of the Commission. Indeed, Section 7A(i)(1) of the H-S-R Act, 15 U.S.C. § 18a(i)(1), specifically provides that:

> Any action taken by the Federal Trade Commission or by the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other Section of this Act or any other provision of law. (Emphasis added).

In May, 1984, the Commission notified the Attorneys General by letter that the Commission had denied the requests for access to the documents. In a 3-2 decision, the Commission determined that it did not have the "authority to make available to state law enforcement agencies information obtained by the Commission pursuant to the premerger notification provisions of the Hart-Scott-Rodino Act", as it was restricted by Section 7A(h) of that Act, 15 U.S.C. § 18a(h). Even with no premerger materials, twenty-two State Attorneys General filed extensive comments with the FTC concerning the Texaco-Getty merger.

The rulings in the Lieberman and Mattox cases, affirming the FTC's decision, abrogate what was always considered the spirit of cooperation between federal and state antitrust officials. Such cooperation was envisioned as far back as the enactment of the Sherman Antitrust Act in 1890. As contemplated by Senator Sherman, the sponsor of the federal antitrust laws, federal enforcement of antitrust law was meant to complement, not abrogate, state antitrust enforcement. Senator Sherman made this point forcefully when he remarked on the floor of the Senate that the purpose of the Sherman Act was:

> [T]o supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal court within the full limits of their constitutional power that they may co-operate with the state courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States....

21 Cong. Rec. 2456-57 (1890).

The federal government and the states historically have coordinated their antitrust law enforcement efforts. The federal government has sought to remedy the interstate aspects of anti-competitive behavior, while at the same time encouraging and assisting the states in remedying the generally local aspects of the same behavior.

This was the relationship anticipated by the State Attorneys General when they requested the FTC's assistance in evaluating the recent oil company acquisitions. Understanding that the FTC's investigation of these acquisitions would attempt to correct the likely anti-competitive effects the acquisitions would have on

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initial waiting period for cash tender offers.

The waiting periods under the Williams Act have been amended from those in effect at the time of the passage of the Act so that all tender offers (other than self-tenders), regardless of the consideration offered or the number of shares sought, must remain open twenty business days. 17 C.F.R. § 240.14e-1(a). Withdrawal rights remain in effect as long as the offer remains open. 17 C.F.R. § 240.14d-7.

The twenty business day waiting period under the Williams Act can expire as early as the 26th calendar day from the date of commencement of the offer. The initial fifteen calendar-day waiting period under the Act expires well within the Williams Act waiting period (assuming, as is often the case, that the required notification is made on the same day as the offer is commenced, and there is no request for additional information pursuant to Section 7A(e) of the Clayton Act). Under the same assumption, with elimination of the shortened initial waiting period for cash tender offers, the initial waiting period would expire on the 30th day following the date of commencement of the offer which would be 31 days from the date of the commencement of the offer. Thus, the proposed legislation could delay transactions beyond the Williams Act waiting periods even when there are no substantive antitrust concerns.

The additional five calendar days effectively added to the Williams Act waiting period by the proposals may inhibit cash tender offers by "unduly favoring the target firm's incumbent management, and permit[ing] them to frustrate many procompetitive tenders." H.R. Rep. No. 94-1373, 94th Cong. 2d Sess. 12 (1976). The Section recognizes that the Act, at the time it was adopted, imposed a minimum of four additional calendar days on top of the Williams Act waiting period. But this addition was necessary because of the inadequacy of the Williams Act ten-day waiting period for antitrust review. There has been no public suggestion from either antitrust interstate commerce, the State Attorneys General, in undertaking their investigations, sought to address the likely anti-competitive effects of the acquisitions on local commerce.

In asking the Commission for its staff work papers and analyses concerning the acquisition's effects on states, the Attorneys General hoped to work with the FTC staff and to benefit from the staff's expertise in assessing oil and gas industry acquisitions. The Commission's experience in this area is substantial. Since 1914, the FTC has had authority to evaluate the competitive effects of large mergers and acquisitions on interstate commerce. In recent years the FTC's Petroleum Section has evaluated the competitive effects of many other mergers in the oil and gas industry. Indeed, so great is the FTC's expertise in this area that the Justice Department has deferred to the FTC's experience regarding oil and gas transactions by agreeing to permit the FTC alone to evaluate the competitive effects of such transactions.

Until May, 1984, the Commission recognized the efficiencies and other benefits of allowing State Attorneys General access to investigative materials. Commissioner Patricia Bailey, in her dissent from the FTC decision, observed:

> Disclosure to state attorneys general on a non-public basis seems to me both legally defensible and inherently reasonable. Moreover, until today, this was also the Commission's position. For instance, the Commission earlier this year debated at length in another Clayton Act matter whether the FTC General Counsel or the Commission itself had the discretion to decline a state's request for access to a confidential document in a particular instance. In [the General Counsel's] discussion and the divided vote that followed, it was implicit in the staff legal papers that the Commission had a policy permitting access by the state attorneys general to materials obtained under Hart-Scott-Rodino authority. Prior to this particular instance, the Commission in Hart-Scott-Rodino matters had apparently routinely given non-public access to investigative materials to states on their request. (Emphasis added).

There is absolutely no policy justification for not sharing premerger materials with the states. The only fear in disclosing such materials - the danger that public dissemination of this sensitive commercial and financial information will injure the merging parties if it reaches the hands of competitors - is absent here because Connecticut, like every other state that has requested premerger materials, certified to the FTC that the information would remain confidential except as might be relevant for official law enforcement purposes.

The H-S-R Act does not appear on its face to alter the longstanding policy of federal-state cooperation. Judicial gloss, however, has made amendment through Senate Bill S.432 necessary. The disclosure provision for premerger notification materials in the possession of the Commission and/or the Justice Department is set forth in Section 7A(h) of the H-S-R Act and provides that:

> Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under Section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

15 U.S.C. § 18a(h). (Emphasis added).

It is abundantly clear from the text of Section 7A(h), that the Commission and the Justice Department are barred from making premerger materials "public" with the exception of disclosure to Congress or in an administrative or judicial action or proceeding. The words of this statute do not reveal any Congressional intention to alter the policy of "nonpublic" disclosure of such materials. It is this distinction between "public" and "nonpublic" disclosure under Section 7A(h) that was the issue before the courts. The text of Section 7A(h) alone failed to clarify such distinction to the courts' satisfaction.

The denial of the requests for documents concerning the Texaco-Getty merger had the effect of declaring that sharing of information with State Attorneys General was public disclosure of such information. We contended that Commission disclosure of such information to State Attorneys General was not "public" disclosure.

Federal courts have recognized the distinction between public and nonpublic disclosure of Commission materials and information. For example, in Interco, Inc. v. FTC, 490 F. Supp. 39 (D.D.C. 1979), the court considered, under the pre-1980 version of Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), Interco's challenge of the requests of twenty-two State Attorneys General for access to Commission materials and information for purposes of determining if any State antitrust violations existed. Like Section 7A(h), the pre-1980 version of Section 6(f) did not explicitly provide for access to Commission investigative materials to State law enforcement agencies. It provided that the Commission has the power:

> [t]o make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

15 U.S.C. § 46(f) (1976). (Emphasis added).

Under both the pre-1980 version of Section 6(f) of the FTC Act and Section 7A(h) of the H-S-R Act, the disclosure of investigative materials by the Commission is clearly restricted. In Interco, the court agreed with the Commission's position that the pre-1980 version of Section 6(f) gave the Commission wide discretion to release documents obtained pursuant to an investigation, including trade secrets and customer lists, to State Attorneys General who had given the Commission reasonable assurances that the documents would not be released to the public. 490 F. Supp. at 46. The court clearly and concisely recognized the distinction between public and nonpublic disclosure of Commission information, irrespective of the confidential nature of the documents. Id. at 44. The Interco analysis of the pre-1980 version of Section 6(f), together with the Congressional codification of this decision in the 1980 amendment to Section 6(f), left no doubt that Commission disclosure to State Attorneys General is nonpublic disclosure. Therefore, we argued in the federal court cases that an analysis of Section 7A(h) must similarly reflect the well-established distinction between public and nonpublic disclosure.

Public policy is served by distinguishing between public and nonpublic disclosure of Commission and Justice Department investigative materials. Two mutually compatible purposes are served as a result; there is, on the one hand, the need to safeguard corporations from the competitive injuries which result from the disclosure of trade secrets, and, on the other hand, the need to disclose information which could be used to correct anti-competitive business practices. The distinction between public and nonpublic disclosure is an appropriate mechanism to balance these purposes. In the Interco case, the court emphasized that:

> [T]he public interest in the enforcement of antitrust laws is entitled to the most serious consideration and would be thwarted if the Commission could not in a confidential release of documents to state attorneys general, provide law enforcement authorities with the information necessary to prosecute possible violations of those laws.

490 F. Supp. at 46.

Access to FTC materials by State Attorneys General has been litigated in other cases as well. In Fleming v. FTC, 670 F.2d 311 (D.C. Cir. 1982) and Jaymar-Ruby, Inc. v. FTC, 651 F.2d 506 (7th Cir. 1981), two federal circuit courts discussed the substantial public interest in preventing duplication of the investigatory efforts among state and federal law enforcement agencies and each court found in favor of access to the State Attorneys General.

When Congress amended Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), in 1980, it sought to remove any doubt of its intent to promote this Federal-State cooperation in the enforcement of the antitrust laws. Section 6(f) now authorizes the Commission to share privileged information with any Federal or State law enforcement agency, provided that the agency certifies that the information will remain confidential and be used only for official law enforcement purposes.

The present language of Section 6(f) explicitly demonstrates Congressional intent to create a Federal-State sharing of information. The legislative history of the 1980 amendment to Section 6(f) supports this interpretation. The purpose in amending Section 6(f) was stated unequivocally by Rep. Richardson Preyer, one of the principal architects of the FTC Improvements Act of 1980:

> In section 3(a) and section 14 of the bill, amending Section 6(f) and adding a new section 21 to the FTC Act, we intended to confirm the Commission's policy of providing documents and information on a nonpublic basis to Federal law enforcement agencies and to State attorneys general for State law enforcement purposes.
>
> This sharing of information is in the best spirit of Federal-State cooperation. It enhances the States' ability to remedy, in a matter chosen by the State, economic activities that had adversely affected their citizens. It saves taxpayers' money by minimizing

> the duplication of efforts and by reducing the time and effort necessary to conduct State investigations.
>
> The purpose of these provisions...is intended to prevent situations like those occurring in two recent cases. In one, Interco, Inc. against FTC, it took some 17 months of litigation before the Commission was free to disclose documents to more than 20 State attorneys general. In another, Martin Marietta Corp. against FTC, the Commission spent four months discussing the proposed disclosure with the company personnel, then was enjoined from disclosing the documents for another 8 months before the Commission could disclose it.

126 Cong. Rec. 11,831 (1980). The denial of access to the State Attorneys General of Commission-generated documents dismisses this broad Congressional mandate for a Federal-State sharing of Commission information.

There is no reason that the "make public" language of Section 6(f) of the FTC Act should be interpreted differently than the "made public" langugage of Section 7A(h) of the H-S-R Act and codified as part of the Clayton Act. Both provisions concern release of confidential information submitted to the Commission by businesses. Both provisions are designed to protect the confidentiality of Commission-generated materials. Both deal with sensitive business information, such as trade secrets, customer lists and commercial or financial information. Both prohibit "public" disclosure of such materials. Both include a Congressional policy of cooperation between the Commission and the states through the "nonpublic" sharing of information generated by the Commission. The FTC Act shares not only the same subject matter with the other anitrust laws, it shares the same policies and goals. It is clear that the public is not entitled to access to that confidential information. But, public policy warrants the sharing of that information between State and Federal law enforcement agencies.

Unquestionably, Congress did not, by passage of the H-S-R Act, divest the States of their unquestioned authority with respect to national competition policy, merger enforcement, or prosecution under their respective state statutes. Meaningful cooperation between the federal government and the states is essential to enforcement of both state and federal antitrust laws. Senate Bill S.432 will restore the efficacy of this cooperative effort.

Just as the FTC has authority to disclose premerger materials, so does the Justice Department, despite its protestations. The plain language of Section 4F(b) of the Clayton Act, enacted as part of Title III of the H-S-R Act, enhances the federal-state cooperation policy and authorizes disclosure of such information. Section 4F(b) provides:

> To assist a State attorney general...in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

The position of the Justice Department that it does not have authority comparable to that which the Commission has to release H-S-R material is simply wrong. The Justice Department's authority to disclose premerger information under Section 4F(b) of the Clayton Act depends in turn on the construction of Section 7A(h). If Section 7A(h) does not prohibit disclosure, then Section 4F(b) permits disclosure.

Section 4F(b) clearly allows disclosure to State Attorneys General. The plain language of Section 4F(b) reaches beyond the contours of the other sections of Title III of the H-S-R Act. Thus, any investigative or other file not otherwise precluded by law from disclosure may be requested by a State Attorney General. The statute clearly provides: "[t]o assist a State attorney general in evaluating the notice or in bringing action under this Act." The reference to "Act" includes not only parens patriae actions, but rather any action that may be brought by a State Attorney General under the Clayton Act. Section 1 of the Clayton Act, 15 U.S.C. § 12, defines "This Act" as the "Clayton Act." Section 4F(b) is part of the Clayton Act.

Therefore, if State Attorneys General are not the "public" within the meaning of Section 7A(h), then, in accordance with Section 4F(b), disclosure is authorized by the Attorney General of the United States "to the extent permitted by law." Thus, both the Federal Trade Commission and the Antitrust Division of the United States Department of Justice possess the authority to release H-S-R materials.

Despite this statutory authority for disclosure of premerger notification materials for "nonpublic" use, the Justice Department, the Commission and the Courts have refused State Attorneys General important and necessary data by asserting that Sections 7A(h) prohibits such disclosure. In the Lieberman case, the court looked beyond statutory language and examined the legislative history of Section 7A(h) of the H-S-R Act and determined that its "analysis of the statutory structure as a whole, and the purpose behind Congress's action, reveals that Congress did not contemplate the use of premerger information by state officials." 771 F.2d at 39. In considering this same issue, the Mattox court stated the problem faced by the State Attorneys General more bluntly:

> In a sequential pattern of inquiry into the purpose of Congress a first subscription to the notion that sharing H-S-R materials with state attorneys general is a sound policy, misplaces the focus. It presents an unacceptably high risk that the intent of Congress was discovered in the pocket of a black robe, rather than in Congressional halls. This we decline to do, despite the well-stated plea of Texas.

752 F.2d at 124.

Therefore, the Lieberman and Mattox courts affirmed the decision of the FTC in denying access to the states. Although I believe that these two courts have misread the intentions of Congress with respect to access to State Attorneys General, both cases make clear the necessity of Congress addressing this issue of access in light of the lack of specificity in Section 7A(h). Congressional action is necessary to reaffirm the foundation of federal-state cooperation upon which efficient and meaningful antitrust enforcement depends.

Therefore, on behalf of the National Association of Attorneys General, I urge the adoption of Senate Bill S.432 which would amend Section 7A(h) of the H-S-R Act to permit access of premerger notification materials to State Attorneys General for use in law enforcement activities.

Senator METZENBAUM. Either of you can answer this question: When, if ever, did the State attorneys general file a suit to stop an anti-competitive merger and the FTC and the Justice Department took no action?

Mr. ZIMMERMAN. Mr. Chairman, one such example is our case in Pennsylvania involving Associated Dry Goods, the parent of Horne's Department Store, and May, the parent of Kaufmann's Department Store—these were the two major department stores in western Pennsylvania, Pittsburgh, Allegheny County.

In that particular case, we filed suit and on the day we were to go to trial, the matter was settled, and as a result of that settlement May divested or sold the 13 store Horne's chain, including Youngstown, Ohio, Cleveland stores, and also one in Erie, Pennsylvania.

Senator METZENBAUM. I myself sent a letter to the FTC urging them to take action in connection with that particular subject.

Mr. ZIMMERMAN. We appreciate your support, Mr. Chairman.

Senator METZENBAUM. How much money and time would your State have saved during the investigation of a merger if the FTC had given you access to pre-merger filings?

Mr. ZIMMERMAN. Well, it is difficult to say exactly with any specificity, but in the *Horne-Kaufmann* case, the May-Associated merger, we spent slightly in excess of $250,000. That does not include the lawyer time involved, so there would be a considerable saving.

Senator METZENBAUM. I want to say that I believe that there is merit to the attorneys general having access to Hart-Scott-Rodino pre-merger information. Prior to the 1984 decision, I do not think that there was any misuse of the material by State attorneys general.

But having said that, I must say to you that this is one of the more controversial parts of the bill, and I would say with all due candor that I think that the position that the attorneys general have vis-a-vis the members of the Senate who are involved at this matter both at the subcommittee level and the committee level will be very much determinative as to whether or not that part of the bill can be retained in the bill because it definitely is a controversial part of the legislation.

I guess what I am saying to you is if you feel that strongly about it, then we will be looking to see what some of the Senators who represent those States where the attorneys general are involved—what position they take vis-a-vis this subject.

Thank you very much, Mr. Zimmerman, Mr. Langer.

Mr. ZIMMERMAN. Thank you, Mr. Chairman.

Senator METZENBAUM. Our next panel consists of Mark Crane, Chairman of the Antitrust Law Section of the American Bar Association; Fred Myers, Vice President, General Counsel and Secretary of Goodyear Tire and Rubber Company; and Malcolm Pfunder of Hamel and Park.

Mr. Crane, we are happy to hear from you, sir.

STATEMENT OF A PANEL CONSISTING OF MARK CRANE, CHAIRMAN, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION; FREDRICK S. MYERS, VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY, GOODYEAR TIRE & RUBBER CO.; AND MALCOLM R. PFUNDER, HAMEL & PARK

Mr. **Crane**. Mr. Chairman, I wish to express the appreciation of the Antitrust Section of the American Bar Association for the opportunity to present a written statement and to testify here today.

I wish to underscore that this is a position of the Antitrust Section and not of the entire American Bar Association. The time constraints which were imposed in order to be able to appear here made it impossible than to go further than to obtain section approval.

Very briefly, because I know that you will put the statement in the record, we are here to take the following positions, and I will not describe the reasons because they are in the report.

Senator **Metzenbaum**. Would you pull the mike a little closer to you because I do not want to miss what you say?

Mr. **Crane**. Certainly. Can you hear me better?

Senator **Metzenbaum**. I hear you better.

Mr. **Crane**. First, with respect to waiting periods, we do not perceive any need to extend the original waiting period, but we do favor the extension with respect to the additional waiting period for cash tenders.

Second, we do not believe there is any reason to treat large mergers differently than ordinary mergers and oppose the extended waiting period based simply on the size of the merger.

Third, with respect to the loopholes, we concur with the view that the loophole for partnerships should be closed, but we believe that the partnership loophole should be closed by regulation, essentially for the reasons stated by Commissioner Calvani earlier today.

Fourth, we oppose the disclosure of confidential information provided under the present bill, which is very broad. It provides for disclosure, as we understand it, to other Federal and State officials for law enforcement purposes, and we believe that this is going to undermine the confidence in confidential treatment which underscores the whole pre-merger notification process.

This is not to suggest that any particular group of people is more likely to disclose than anybody else, but simply that, the more people that have access to the information, the greater is the chance of disclosure.

We believe that the bill provides for much too broad disclosure without a sufficient reason for it.

That, in essence, is our position, Senator. I would be happy to answer questions, but I know you are anxious to conclude this hearing.

Senator **Metzenbaum**. I appreciate your succinct presentation, Mr. Crane. With respect to the closing of the——

Mr. **Crane**. The partnership loophole, sir?

Senator **Metzenbaum**. Yes. If the Senate sees fit to move with it and the House as well, we know that the legislative process is not always an expeditious one, but we also know the regulatory procedures are oftentimes even more dragged out.

Do you see any problem about the Senate moving this rather promptly? If by that time, the FTC has moved on its own, then we certainly can dump the bill in midstream if they have done a good enough job, because, frankly, I do not really care whether we do it by regulation or we do it by legislation.

Would the Antitrust Section of the American Bar be comfortable with that?

Mr. **Crane**. We believe that it should be closed. If it is not going to be closed by regulation, then we would have no objection to it being closed by statute. We have, in the report, raised some questions about the particular method which the bill uses to close the loophole and we have a preference for a different mechanic for closing it which is set forth in the report.

Senator **Metzenbaum**. I agree we should be concerned that we do not unfairly hinder takeovers by cash tender offers, but is not the main consideration that the first Hart-Scott-Rodino waiting period not be too long and that once an antitrust problem has been identified and more information has been requested, should we not make sure the second Hart-Scott-Rodino waiting period is the same as for other mergers?

Mr. **Crane**. Yes, and that is the position we take in our report. We believe that there is a prime facie showing that there may be an antitrust problem if additional information has to be requested, and therefore believe that there should be the extension that the bill suggests.

Senator **Metzenbaum**. I am happy to have your testimony, Mr. Crane, and I think your succinct presentation bodes well for the future because we expect to hear from you quite often.

Mr. **Crane**. Well, I hope that you will have that opportunity, Senator. We appreciate the opportunity to testify and to discuss these matters informally with your staff.

Senator **Metzenbaum**. Thank you very much.

[Statement follows:]

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

COMMENTS OF THE ANTITRUST SECTION AMERICAN BAR ASSOCIATION

These comments respond to three bills recently introduced to amend Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"), codified as Section 7A of the Clayton Act, 15 U.S.C. § 18a: (a) H.R. 586 to amend Section 7A of the Clayton Act to extend the waiting periods and to expand the applicability of the notification requirement, to make subject to the Act certain persons who act in concert to acquire voting securities or assets of another person, to require such notification to include an economic impact statement, and for other purposes; (b) S.431 to amend the Clayton Act regarding partnerships; and (c) S.432 to amend the Clayton Act regarding mergers. Since the issues addressed in the House bill overlap to some extent the issues addressed in the two Senate bills, the comments are organized on an issue-by-issue basis rather than addressing the bills separately.

1. Proposed Amendments to 15 U.S.C. § 18a(e) Regarding the Statutory Waiting Periods

Section 7A of the Clayton Act currently provides that no person subject to the jurisdictional requirements of Section 7A(a)(1)-(3) shall acquire, directly or indirectly, any voting securities or assets of any other person until the end of the thirtieth day (or in the case of a cash tender offer, the fifteenth day) after the date of receipt of the required notification. If the Federal Trade Commission ("FTC") or the Assistant Attorney General ("AAG") issues a request for additional information pursuant to Section 7A(e) of the Clayton Act, 15 U.S.C. § 18a(e), it or he has the discretion to extend the initial waiting period for an additional 20 days (or in the case of a cash tender offer, 10 days) after substantial compliance by the person or persons to whom the request was issued.

Both H.R. 586 and S.432 propose to amend Section 7A of the Clayton Act by eliminating the shortened waiting periods for cash tender offers and making the waiting periods for cash tender offers coterminous with the waiting periods applied to other transactions. H.R. 586 goes further and proposes to eliminate the discretion vested in the FTC and the AAG to terminate the additional waiting period prior to its expiration. Finally, both bills propose that the additional waiting period in certain large transactions be 60 days, although they differ as to the proper unit of measurement for the size of transactions. H.R. 586 would require a 60-day additional waiting period if the proposed transaction would result in the acquiring person holding U.S. assets valued at more than $1 billion or having probable annual sales in the U.S. in excess of $1 billion. S.432 would permit the antitrust authorities to impose a 60-day additional waiting period if, as a result of the acquisition, the acquiring person would hold voting securities or assets of the acquired person in excess of $1 billion.

For the reasons set forth below, the Section opposes each of these proposals except the Section does not oppose the proposal to eliminate the Act's shortened additional waiting period for cash tender offers.

(a) Cash Tender Offer Waiting Period

The rationale for the Act's shortened waiting periods for cash tender offers is rooted in the provisions of the Williams Act, and the regulations promulgated thereunder, in force at the time the Act was adopted. The Williams Act, adopted in 1970, amended the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, to regulate, among other things, how long a tender offer must be held open and when shareholders who have tendered into the offer must be allowed to withdraw their shares. In adopting the Williams Act, Congress intended to protect shareholders while maintaining neutrality in the market for corporate control. Edgar v. Mite Corp., 457 U.S. 624, 633 (1982).

(i) The Initial Waiting Period

The legislative history to Title II of the Act indicates that Congress adopted shortened waiting periods for cash tender offers in order "to strike a balance between the ten-day [or, in the event that the offer is for 'any and all shares,' seven-day] Williams Act waiting period, and the thirty-day premerger waiting period" established by the Act for all other reportable transactions. H.R. Rep. No. 94-1373, 94th Cong. 2d Sess. 12 (1976).

No substantive antitrust reason exists for providing shortened waiting periods for cash tender offers. In fact, substantive antitrust concerns militate against the shortened waiting periods. Congress noted that "it is simply impossible to analyze the antitrust implications of a cash tender offer" within the 10-day Williams Act waiting period. Id. Congress considered the shortened cash tender offer waiting periods a "compromise" that "should not unduly inhibit" cash tender offers yet "provides the antitrust enforcement agencies with a realistic opportunity to review the antitrust implications of a cash tender offer, before it is consummated." Id. at 12-13.

The Section believes that the goals of not unduly inhibiting cash tender offers yet providing sufficient time for antitrust review should guide the analysis of the proposals to eliminate the Act's shortened waiting periods for cash tender offers. In this regard, the Section believes that eliminating the Act's shortened initial waiting period for cash tender offers may have an inhibiting effect on cash tender offers, without satisfying any identifiable need for the additional time to allow antitrust enforcement agencies to review the antitrust implications of cash tender offers. Accordingly, the Section recommends against eliminating the Act's shortened agency that the current 15 calendar-day waiting period allows insufficient time to review the antitrust considerations of cash tender offers. Accordingly, the Section sees no reason to extend the Act's initial waiting period.

(ii) The Additional Waiting Period

Although the Section opposes eliminating the Act's shortened initial waiting period for cash tender offers, it does not oppose eliminating the Act's shortened additional waiting period for cash tender offers. Where a transaction raises sufficient antitrust concerns such that the FTC or the AAG issues a request for additional information, it would be reasonable to permit the agencies 20 days to review the additional information provided by the parties to the transaction. Issuance of a request for additional information indicates that antitrust issues are sufficiently important to warrant delaying the transaction. Moreover, the antitrust enforcement agencies frequently request extensions of the additional waiting period in cash tender offer transactions. All transactions subject to the Act should be subject to the discretionary 20-day additional waiting period in the event of a request for additional information.

H.R. 586 also appears to eliminate the discretion of the FTC or the AAG to terminate the additional waiting period prior to its expiration. The Section does not understand the rationale for this elimination of discretion, particularly in light of the fact that the FTC and AAG's discretion to terminate the initial waiting period prior to its expiration remains unaffected by H.R. 586. To the extent that H.R. 586 does eliminate this discretion, the Section opposes it because it imposes unnecessary burdens on parties to transactions that do not raise substantive antitrust concern. Just as Section 7A(b)(2) of the Clayton Act gives the FTC or the AAG the discretion to terminate the initial waiting period prior to its expiration, Section 7A(e)(2) should provide for discretionary termination of the additional waiting period. Once the antitrust authorities have satisfied themselves that a transaction will not adversely affect competition, they should be permitted to terminate the waiting period so that the parties can complete their transaction.

(b) Proposed 60-day Additional Waiting Period

The provision in S.432 that would permit the antitrust enforcement agencies to impose a 60-day additional waiting period on large transactions is based on the premise that antitrust analysis is more time consuming in large acquisitions than in small ones. The Section questions this premise. The premise of H.R. 586's analogous section imposing a mandatory 60-day additional waiting period -- that acquisitions resulting in large entities require more time to analyze -- is even more troublesome. First, large transactions and acquisitions resulting in large companies can be easier to analyze than smaller transactions and acquisitions by smaller companies because there is often more publicly-available information about the structure and operation of the relevant markets. Second, a transaction may be large in dollar terms or result in the formation of a large company yet involve only limited competitive overlaps; neither the size of the transaction nor the size of the resulting company reveals much about competitive overlaps. Finally, the complexity of the relevant markets, not the size of the transaction or size of the resulting person, is what makes analysis under the agencies' Merger Guidelines difficult and time-consuming. In short, these proposals would extend, or grant antitrust enforcement agencies the discretion to extend, by 40 days the additional waiting periods for a number of transactions where there is no need to do so.

Particularly in the case of H.R. 586, which would eliminate the agencies' discretion to terminate the additional waiting period, the change is likely to tip the balance in the market for corporate control in favor of incumbent management. The prospect of having to keep a tender offer open for longer than three months (30-day initial waiting period, plus one to two weeks to respond to the request for additional information, plus 60-day additional waiting period) may inhibit some procompetitive offers from being made.

Although S.432 at least contains a workable test for differentiating large transactions from small ones, the provision in H.R. 586 for distinguishing transactions makes little sense. H.R. 586 focuses on the U.S. assets and probable U.S. sales of the resulting entity. Accordingly, where the FTC or the AAG requests additional information, it would impose a 60-day additional waiting period on all transactions involving one party with $1 billion in U.S. assets or probable U.S. sales, regardless of the size of the acquisition. "Probable sales" is not defined in the bill or in the present rules, and would be subject to a wide variety of interpretations. Administration of the Act would be complicated because the provision appears to require the parties to the transaction and the FTC to engage in predictions of future sales. At the very least, the concept of probable sales should be abandoned and the test should turn on the sum of the actual sales of the acquiring and acquired person in the most recent year.

There has been no indication from either the FTC or the AAG that the additional waiting periods need to be lengthened for any particular size of transaction to improve enforcement of the antitrust laws, yet both bills would greatly increase those periods. If enacted, these bills could deter procompetitive mergers and acquisitions by greatly increasing regulatory delays to transactions that do not raise significant or difficult substantive antitrust concerns. This is inconsistent with the intent of Congress in enacting the original Act, which was to assist the government in enforcing the antitrust laws applicable to mergers and acquisitions, while avoiding any incidental effect on the market for corporate control unless absolutely necessary. S. Rep. No. 803, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. 1373, 94th Cong., 2d Sess. 5 (1976).

2. Proposed Amendments to 15 U.S.C. §§ 18a(a), 18a(b) Regarding the Size-of-Person Test and the Definition of "Person"

S.431 and H.R. 586 contain provisions aimed at requiring reporting under the Act of certain acquisitions which may not be reportable under current interpretations of the existing law. The proponents of these bills are apparently concerned with three different situations:

> (i) The partnership "loophole" created by the antitrust agencies' determination to consider a partnership its own "ultimate parent entity" -- *i.e.*, an entity not "controlled" by any other person or entity within the meaning of the Rules promulgated under the Act;
>
> (ii) The ability of a corporation capitalized with less than $10 million above the consideration for the acquisition, and having no controlling shareholder, to consummate large acquisitions without compliance with the Act because it is not deemed a "$10 million person" under Section 7A(a)(2)(C) of the Act regardless of the amount of its assets, as a result of the antitrust agencies' determination not to include such assets for purposes of the "size-of-person" test; and
>
> (iii) The Act's inapplicability to purchases of stock or assets by persons acting "in concert," attributable to the antitrust agencies' decision, adopted in a formal rulemaking in 1983, to delete the term "group" from the definition of entities subject to the Act.

The recommendation of the Section with respect to these three subjects can be summarized as follows:

> (i) The partnership "loophole" should be closed; we respectfully suggest that this can best be accomplished by a regulation promulgated, after an opportunity for public comment, by the antitrust agencies and understand that such a regulation is now being finalized;
>
> (ii) The $10 million "size of person" criterion under Section 7A(a)(2)(C) should not be reduced to $1 million; such action would only complicate, but not prevent, use of thinly capitalized corporations (which

has not, in any event, been shown to raise significant compliance issues under the Act); and

(iii) The antitrust agencies' rejection of the "group" concept appears well founded and should not be overturned; efforts to determine when parties are, in some sense, acting "in concert" would complicate compliance with and administration of the Act without the likelihood of significant benefit to substantive antitrust enforcement.

(a) The Partnership "Loophole"

The antitrust agencies have recognized the need for regulations to plug the "loophole" that has allowed some partnerships to consummate major acquisitions without complying with the Act and are presently engaged in drafting such regulations.* We recommend that Congress allow this area to be addressed by the responsible regulatory authorities which have already devoted substantial time and effort to this issue.

The solution proposed by S.431 -- to define "person" to include, in the case of a partnership, "any general partner and any partner with an equity interest of 50 per centum or more" -- is both overinclusive and underinclusive. It is over inclusive in that inclusion of all general partners, without regard to their economic interest, imposes a reporting burden without a clear showing of benefit. Moreover, a dilatory or recalcitrant general partner, by refusing to provide necessary data about his or its unrelated business activities, would potentially have the ability to stop a transaction favored by a majority of the partnership. It is underinclusive in that, for example, a partnership with one general partner having less than $10 million in assets and two limited partners each with a 49 percent equity interest would not be covered.

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* See, most recently, the testimony of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, on February 4, 1987, before the Committee on the Judiciary, United States Senate. Mr. Rule indicated that, "It's a problem that we are aware of" and stated: "I think it can be taken care of under the current statute; and it will be taken care of." Wall Street Journal, Feb. 5, 1987, p. 4, col. 3.

As an alternative to the S.431 proposed solution, the Section suggests applying an alternative definition of control to all acquiring persons -- whether partnerships or corporations -- that do not otherwise meet the "size-of-person" test of Section 7A(a)(2) of the Act.* With respect to such persons, control would be ascribed to that "owner" holding the largest interest in the acquiring person equal to or greater than 25 percent, regardless of whether such person was otherwise exempt from reporting. If two or more owners hold an equal percentage interest in the acquiring person, each would be deemed to control. If the largest holder with an interest of 25 percent or more does not meet the "size-of-person" test, or if no owner has a 25 percent interest, no filing would be required.

The 25 percent test suggested by the Section avoids the over- and underinclusion problems of the S.431 approach. It also solves the perceived problem of unreported acquisitions by thinly capitalized corporations attempted to be addressed by Sec. 3(a) of H.R. 586, discussed below.

(b) Thinly Capitalized Corporations

As with respect to the partnership "loophole," the Section urges that any solution to the perceived problem of unreported acquisitions by thinly capitalized corporations be addressed by the antitrust agencies through rulemaking, should the responsible authorities determine that this is in fact a problem area. While there appears to be a consensus among the antitrust bar, shared by the antitrust agencies, that the partnership "loophole" should be closed, no such consensus exists with respect to acquisitions by thinly capitalized corporations. The Section believes that dropping the

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* The Section proposed this alternative in Comments on FTC Proposed Rules Regarding Premerger Notification, Reporting and Waiting Period Requirements, 50 Fed. Reg. 38742 et seq., September 24, 1985 (Nov. 28, 1985) at 10-12.

"size-of-person" threshold of Section 7A(a)(2)(C) from $10 million to $1 million (as proposed by Sec. 3(a) of H.R. 586) would require increased reporting of transactions likely to be of no competitive significance -- including, frequently, leveraged buyouts and similar transactions -- which would impose an unnecessary burden upon the parties and the reviewing agencies. Furthermore, the proposed amendment would not eliminate, but only make more difficult, the ability to structure transactions without meeting the Act's "size-of-person" test.

(c) Persons Acting in Concert

Redefining the concept of "acquiring person" to include "two or more separate persons who act in concert to acquire, directly or indirectly, any voting securities or assets of another person" (as proposed by Sec. 3(b) of H.R. 586), would unduly complicate reporting under the Act and greatly increase the number of reportable transactions, with no significant likelihood of reaching transactions of substantive antitrust importance that would otherwise escape scrutiny.

In 1983, Section 801.1(a)(2) of the Rules promulgated under the Act was amended to delete "other group organized for any purpose" from the Rules' definition of "entity." As the Statement of Basis and Purpose ("S.B.P.") to the amendment explained:

> Informal contracts between the Commission staff and persons wishing to determine the reportability of particular transactions indicate that the concept of 'group' is a source of considerable uncertainty and concern. This concern is caused in part by the fact that the Securities and Exchange Commission ("SEC") also requires reporting by entities called groups. The SEC's definition of 'group,' however, which is geared to securities regulation, is too broad for purposes of the rules. Yet the presence of the term 'group' in the rules has led to uncertainty whether the SEC's definition was intended to be applied. Moreover, experience with the rules and the Act has demonstrated that the concept of 'group' is unnecessary for applying the rules; the other organizational units named in the definition have adequately covered situations raising antitrust concerns.

For the reasons set forth in the S.B.P., the Section believes that the determination by the antitrust agencies not to apply the Act to "groups," or persons acting in concert, was sound and should not be overturned.

3. Proposed Amendments to 15 U.S.C. § 18a(h) Regarding the Confidentiality of Filed Materials

The FTC has determined that it is not permitted to release material submitted to it under the Act to state attorneys general. S.432 proposes to amend Section 7A(h) to broaden the classes of persons who would be permitted access to information and documents submitted pursuant to the Act.

At present, Section 7A(h) only permits disclosure of information and documents submitted pursuant to the Act "as may be relevant to any administrative or judicial action or proceeding" and to Congress or its committees. 15 U.S.C. § 18a(h). The proposed amendment would permit the disclosure of such material to officers and employees of "appropriate Federal law enforcement agencies" or to officers and employees of "any State law enforcement agency." An officer of the Federal or State agency would have to certify that such information "will be maintained in confidence." The proposal states that such confidentiality requirement will not limit "any use. . . for official law enforcement purposes, including the preparation of comments regarding consent agreements or decrees." S. 432 at Sec. 3.

One factor that has contributed to the high level of public compliance with the requirements of the Act is the very strict limitation on disclosure of filed materials. The antitrust agencies have an exemplary record in maintaining the confidentiality of filed materials, thus giving filing parties and their legal counsel a high degree of confidence that sensitive material will not be inadvertently disclosed. In furtherance of the confidentiality of such material the FTC and the AAG have established by formal interpretation a procedure for providing prior notice when any materials filed under the Act are to be placed on the public record. 45 Fed. Reg. 21, 215-16 (April 1, 1980).

The Section opposes the proposed amendment because of the wide range of persons to whom, and circumstances under which, such materials would be made available; the lack of clearly defined limitations on the use of such materials; the failure to prohibit public disclosure in connection with law enforcement activities or to require prior notice to the party that submitted the material when material is going to be disclosed; and the absence of specific civil and criminal penalties for any unauthorized disclosure which might occur.

4. Proposed Amendments to 15 U.S.C. § 18A(d) Regarding the Requirement of an Economic Impact Statement

Section 4 of H.R. 586 would require that the premerger notification mandated by the Act contain information relating to the economic impact of the transaction including:

> (1) A statement specifying whether the acquiring person intends to sell or close any facility, or to terminate or alter any operation;
>
> (2) An estimate of the number of employment positions likely to be lost over each of the next five years as a result of the acquisition;
>
> (3) An estimate of the revenue likely to be lost over each of the next five years by each governmental entity in each geographic jurisdiction in which any asset of either party to the acquisition is located;
>
> (4) A statement specifying the aggregate amount of the acquiring person's liabilities and equity both immediately before and after the acquisition; and
>
> (5) A statement identifying any assets of the acquired person that will be or are likely to be used in any way (directly or indirectly) to obtain financing for the acquisition.

The AAG and the FTC would be required to make this information available to the public immediately after it is filed.

The Section opposes Section 4 as inconsistent with the purpose of the Act which is to "strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated." H.R. Report 94-1373, 94th Cong., 2d Sess. 5 (1976).

The Economic Impact Statement proposed in Section 4 would do nothing to further this objective. It is well recognized that the central thrust of the antitrust laws is to preserve competition in those markets where competitive policy has not been displaced by direct governmental regulation. As a part of this effort, Section 7 of the Clayton Act makes unlawful any acquisition or merger the effect of which may be substantially to lessen competition in any line of business in any secton of the country. As interpreted by the courts and the enforcement authorities, this requires an analysis of the products or services offered by the parties to a proposed acquisition and of the structure of the markets for those products or services.

As presently written, the rules adopted by the FTC to implement the premerger notification requirements are carefully tailored to provide the enforcement agencies with the information they need to undertake a preliminary analysis of the competitive effects of a transaction. Thus, the report form requires such information as the identities of the parties, a description of the assets or securities being acquired, a detailed breakdown of each party's revenues using the Census Bureau's SIC codes and, in those cases where two or more parties derive revenues from overlapping SIC codes, detailed information about the location of their operations.

By contrast, the information that would be required in the proposed Economic Impact Statement is, at most, marginally relevant to the antitrust analysis that the agencies must undertake in deciding whether or not to challenge a particular transaction. For example, the number of jobs and the amount of local governmental revenues that would be lost as a result of consolidating the operations of the merging companies would tell the enforcement agencies little, if anything, about the likely impact of the transaction on competition and would be relevant only after analysis of the information presently required indicated that the transaction might violate Section 7 of the Clayton Act.

To the extent the enforcement agencies may need any of the information that would be provided by the proposed Economic Impact Statement, that information could be obtained through a request for additional information pursuant to Section 7A(e) of the Clayton Act.

The Section is further concerned that the proposed Economic Impact Statement will often yield little, if any, of the information sought. In practice, the parties to propose acquistions rarely formulate detailed plans for consolidating their operations prior to consummating the transaction. (The acquired person is particularly unlikely to have access to the information sought.) Thus, in most cases, the parties will be unable to supply meaningful information on the subjects covered by the proposed Economic Impact Statement.

Finally, the Section notes that the proposed disclosure runs counter to the FTC's consistent interpretation that the mere fact of filing and the identities of the parties to the transaction are confidential. The Act may require reporting of transactions which would not be required to be publicly disclosed under existing Federal securities laws, including transactions involving private companies to which no securities disclosure requirements apply. The Section opposes the introduction of a new and different disclosure concept in the context of antitrust enforcement.

Senator **Metzenbaum**. Mr. Myers, from my own home State. I gather you are from Akron, or do you operate out of a different location?

Mr. **Myers**. No; I operate out of Akron, Mr. Chairman.

Senator **Metzenbaum**. Very good. We are happy to welcome you, Mr. Myers.

Mr. **Myers**. Thank you, Mr. Chairman. I do want to thank you for the opportunity to be here and to outline——

Senator **Metzenbaum**. Pull the mike a little closer, please.

Mr. **Myers** [continuing]. And to outline very briefly the problem that I think you are quite well aware of already concerning Goodyear's experience last fall when James Goldsmith—oh, pardon me, Mr. Chairman. I want to point out that Mr. Larry Sorkin of the law firm of Cahill, Gordon & Reindell is with me here this morning.

Senator **Metzenbaum**. We are happy to welcome you as well, sir.

Mr. **Myers**. Last October-November when Goldsmith hit us, there were two entities. However, no Hart-Scott-Rodino filing was made, despite the fact that these two Goldsmith entities bought more than 12,500,000 shares of Goodyear common stock, in which they invested over half a billion dollars.

No filing was made because the two entities that bought the half a billion dollars' worth of our stock were newly formed partnerships, one a Bermuda limited partnership, and the second a Delaware limited partnership.

The identities of the limited partners in those two partnerships were never disclosed. The general partner of each was a newly formed corporation, one a Delaware corporation, and the other a Cayman Islands corporation. Both of these were owned by a second Cayman Islands corporation which was owned, in turn, by a third Cayman Islands corporation, which was controlled by two interlocking Panamanian corporations.

The trail ends at a Liechtenstein trust which controls the Panama corporation. The identities of the principles behind that trust were kept hidden under Liechtenstein secrecy laws, but those principles could well have been another major worldwide tire company or some other competitor of Goodyear.

Now, none of these entities filed a pre-merger notification report. Under the Hart-Scott-Rodino pre-merger notification rules, partnerships are not considered to have ultimate parent entities, so that neither Brunneria, the Liechtenstein trust, nor any of the shell corporations and holding companies by which the partnerships were, in fact, controlled had to file pre-merger notification reports.

As newly formed partnerships without assets beyond money and Goodyear stock, the Bermuda and Delaware limited partnerships did not have to file either.

Although the antitrust authorities could read about our problems in the newspapers, an Anglo-French financier and well known corporate raider was trying to take over Goodyear. None of the information ordinarily supplied as part of pre-merger notification was filed with them.

No one knew then, or for that matter knows today, who or what lay behind that labyrinth of offshore holding companies and corporate shells. Neither the holders nor the holdings of Brunneria, which is a peculiar form of legal entity called an anstalt, have been disclosed in any way.

As I said before, it is possible in such a situation that the ultimate holders are a competitor of the target company. If this were the situation, there could be serious antitrust concerns that the government would never have an opportunity to address.

Although using partnerships in order to hide the identity of a raider seeking to take over a major publicly-held corporation may not be common, Goodyear's experience gives at least some indication of how the anomaly of partnership loophole distorts the application of the Hart-Scott-Rodino Act.

Goodyear's experience convinces us that the present Hart-Scott rules should be changed. Any such change should reflect the reality that partnerships formed to acquire stock or assets of a corporation are not created in a vacuum.

A Hart-Scott filing should be required whenever a partnership makes an acquisition which would be reportable if made directly by the person or entity that actually owns and controls that partnership.

Thank you very much, Mr. Chairman.

Senator METZENBAUM. Let me get something clear. Are you for our legislation to close the loophole?

Mr. MYERS. I am for closing the loophole, as you have said yourself, Mr. Chairman, either by rules from the Federal Trade Commission, if that can be accomplished in a timely manner—we would have liked to have had them last fall, as a matter of fact.

Senator METZENBAUM. You would have liked——

Mr. MYERS. To have had them last fall; or through legislation, if that is the most expeditious way to handle it. We want the loophole closed.

Senator METZENBAUM. And there is not any question in your mind that had this legislation been in effect at that time, Goodyear might be a totally different looking corporation at the moment?

Mr. MYERS. We certainly would have proceeded differently and I think that it could well have forced the raider in our case to have made disclosures that were not made.

Senator METZENBAUM. You have a chart. Is that part of your submission?

Mr. MYERS. Not today. Yes, you are correct. We had it at the House hearing last November.

Senator METZENBAUM. That looks like a new game that might be played to find——

Mr. MYERS. Yes, it does.

Senator METZENBAUM. Either the kind of game that you used to play with walnut shells where you would find the pea or, in this case, find the true owner and its assets. We are going to include that chart in the record as a submission of yours—we think it is very interesting—with your approval.

Mr. MYERS. I would appreciate that, Mr. Chairman.

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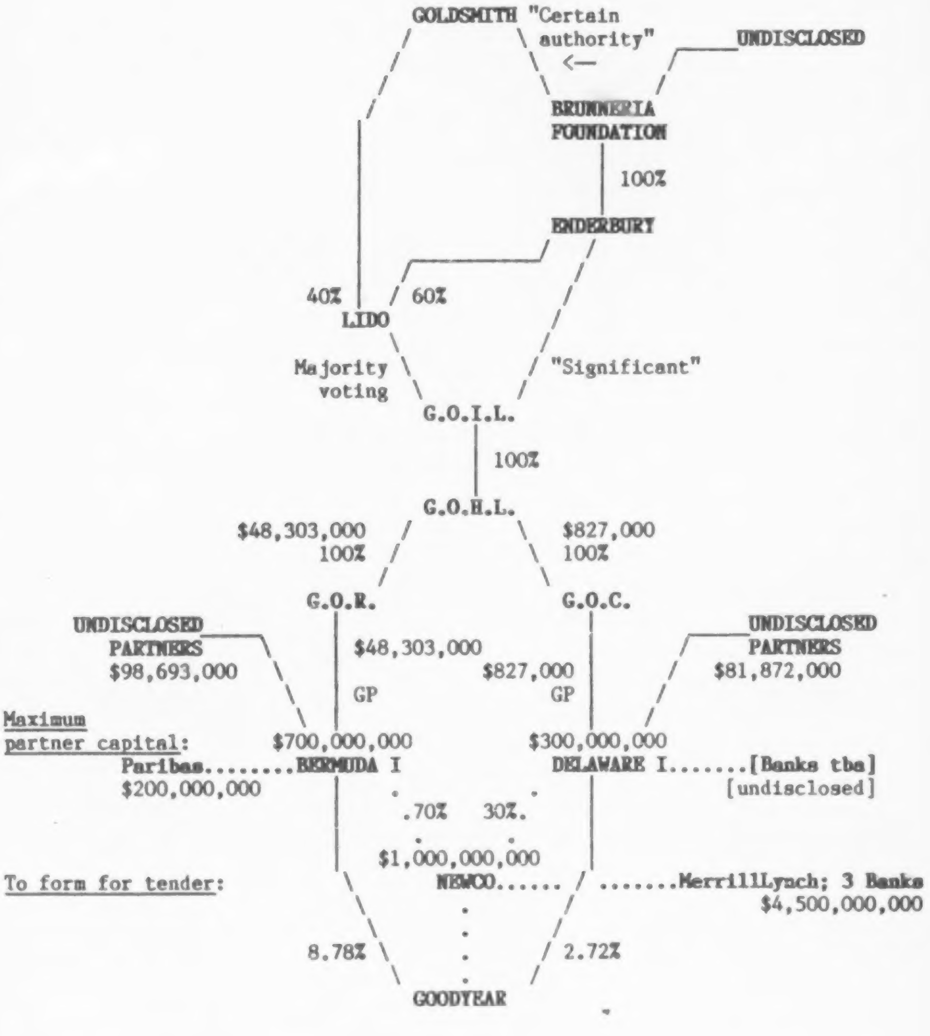
OWNERSHIP DIAGRAM—RELATIONSHIPS


GOLDSMITH
"Certain authority"
<—
UNDISCLOSED
BRUNNERIA FOUNDATION
100%
ENDERBURY
40%
60%
LIDO
Majority voting
"Significant"
G.O.I.L.
100%
G.O.H.L.
$48,303,000
100%
$827,000
100%
G.O.R.
G.O.C.
UNDISCLOSED PARTNERS
$98,693,000
$48,303,000
GP
$827,000
GP
UNDISCLOSED PARTNERS
$81,872,000
Maximum partner capital:
$700,000,000
$300,000,000
Paribas........BERMUDA I
$200,000,000
DELAWARE I.......[Banks tba]
[undisclosed]
.70%
30%.
$1,000,000,000
To form for tender:
NEWCO......
.......MerrillLynch; 3 Banks
$4,500,000,000
8.78%
2.72%
GOODYEAR

GP denotes General Partner.

OWNERSHIP DIAGRAM – DOMICILES

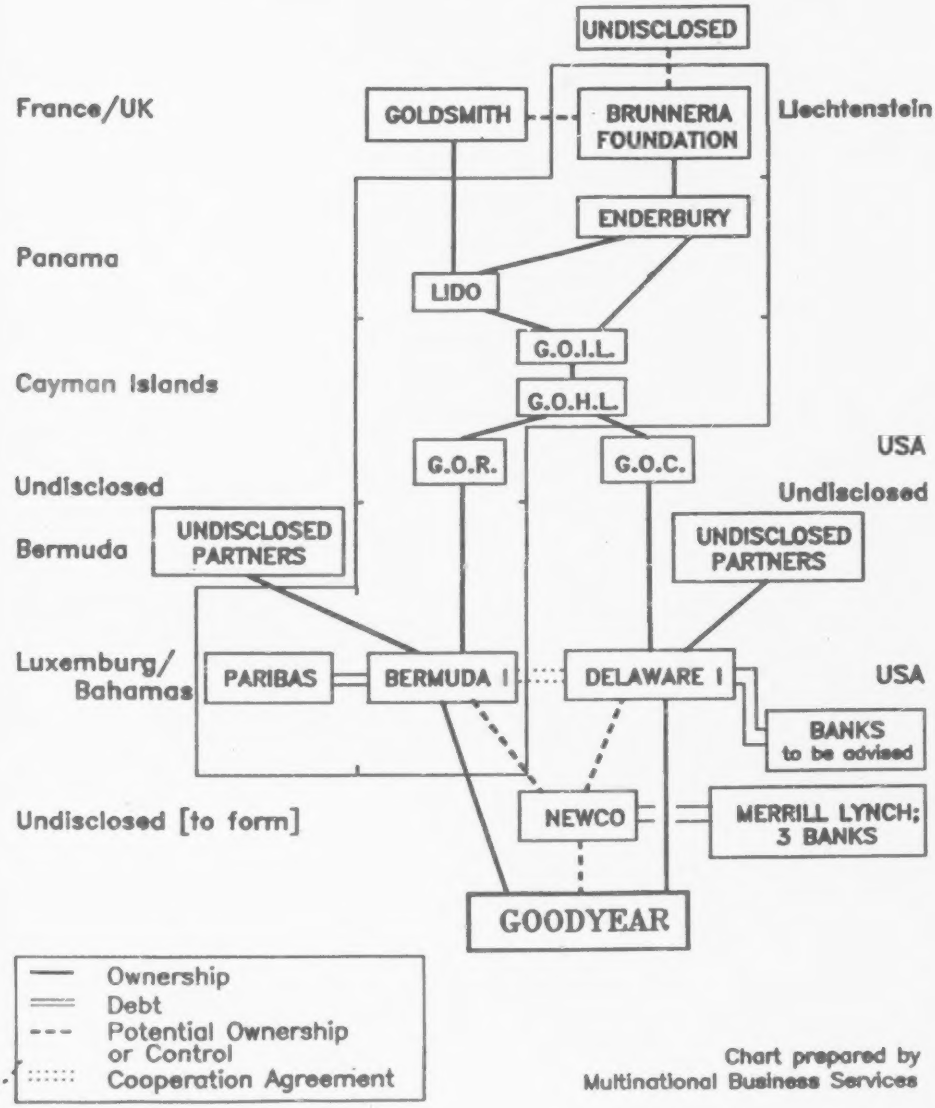

UNDISCLOSED
France/UK
GOLDSMITH
BRUNNERIA FOUNDATION
Liechtenstein
ENDERBURY
Panama
LIDO
G.O.I.L.
Cayman Islands
G.O.H.L.
G.O.R.
G.O.C.
USA
Undisclosed
Undisclosed
Bermuda
UNDISCLOSED PARTNERS
UNDISCLOSED PARTNERS
Luxemburg/ Bahamas
PARIBAS
BERMUDA I
DELAWARE I
USA
BANKS to be advised
Undisclosed [to form]
NEWCO
MERRILL LYNCH; 3 BANKS
GOODYEAR
Ownership
Debt
Potential Ownership or Control
Cooperation Agreement

Chart prepared by
Multinational Business Services

GOLDSMITH	Mr. James M. Goldsmith
BRUNNERIA FOUNDATION	The Brunneria Foundation
ENDERBURY	Enderbury Financial Inc.
LIDO	Compania Financeria Lido
G.O.I.L.	General Oriental Investments Ltd.
G.O.H.L.	General Oriental Holdings Limited
G.O.R.	General Oriental Limited
G.O.C.	General Oriental (Delaware I) Corp.
BERMUDA I	General Oriental (Bermuda I) Limited Partnership
DELAWARE I	General Oriental (Delaware I) Limited Partnership
NEWCO	NEWCO
GOODYEAR	Goodyear Tire & Rubber Company
MERRILL LYNCH	Merrill Lynch & Co., Inc. and Affiliates
3 BANKS	The First National Bank of Chicago The Bank of Nova Scotia Wells Fargo Bank, NA
PARIBAS	Banque Paribas (Luxembourg) S.A. Paribas Suisse (Bahamas) Ltd.

Senator **Metzenbaum**. Thank you.

Mr. **Myers**. Mr. Chairman, I have the report; it has just been handed to me. You are quite right, and we never did find the pea under the walnut shell.

Senator **Metzenbaum**. All right.

[Statement follows:]

Statement of Fredrick S. Myers
Senate Judiciary Committee
Antitrust, Monopolies and Business Rights Subcommittee
Thursday, February 26, 1986

Mr. Chairman and members of the Subcommittee:

I am Fredrick S. Myers, Vice President, General Counsel and Secretary of The Goodyear Tire & Rubber Company. I welcome the opportunity to testify before your Subcommittee concerning the "partnership loophole" in the Hart-Scott-Rodino Premerger Notification rules; and thank you for this opportunity.

Last October and November when James Goldsmith and his entities threatened a takeover of Goodyear, no Hart-Scott-Rodino filing was made despite the fact that two Goldsmith entities bought more than 12.5 million shares of Goodyear common stock for which they paid more than half a billion dollars.

No filing was made because the two entities that bought that half billion dollars' worth of Goodyear stock were newly formed partnerships -- a Bermuda limited partnership and a Delaware limited partnership. The identities of the limited partners in those two partnerships were never disclosed. The general partner of each was a newly formed corporation, one a Delaware corporation and the other a Cayman Islands corporation. Both of these were owned by a second Cayman Islands corporation, which was owned by a third Cayman Islands corporation, which was controlled by two interlocking Panama corporations. The trail ends at a Liechtenstein trust which controls the Panama corporations. The identities of the principals behind that trust are kept hidden under Liechtenstein secrecy laws, but those principals could be anyone -- even a worldwide tire company or maybe some other competitor of Goodyear.

None of these entities filed a Premerger Notification Report. Under the Hart-Scott-Rodino premerger notification rules, partnerships are not considered to have ultimate parent entities so that neither Brunneria, the Liechtenstein Trust, nor any of the shell corporations and holding companies by which the partnerships were in fact controlled, had to file Premerger Notification Reports. As newly formed partnerships without assets beyond money and Goodyear stock, the Bermuda and Delaware limited partnerships did not have to file either.

Although the antitrust authorities could read in the papers that Mr. Goldsmith, an Anglo-French financier and well-known corporate raider, was trying to take over Goodyear, none of the information ordinarily supplied as part of premerger notification was filed with them. No one knew then or knows now who or what lay behind that labyrinth of off-shore holding companies and corporate shells. Neither the holders nor the holdings of Brunneria, a peculiar form of legal entity called an "anstalt," have been disclosed in any way. As I said before, it is possible in such a situation that the ultimate holders are a competitor of the target company. If this was the situation, there would be serious antitrust concerns that the Government would not have the opportunity to review.

Although using partnerships in order to hide the identity of a raider seeking to take over a major publicly held corporation may not be common, Goodyear's experience gives at least some indication of how the anomaly of partnership loophole distorts the application of the Hart-Scott-Rodino Act.

Goodyear's experience convinces me the present Hart-Scott-Rodino rules should be changed. Any such change should reflect the reality that partnerships formed to acquire stock or assets of a corporation are not created in a vacuum. An H.S.R. filing should be required whenever a partnership makes an acquisition which would be reportable if made directly by the person or entity that actually owns and controls the partnership.

Thank you very much.

Senator **Metzenbaum**. Mr. Malcolm Pfunder, of Hamel and Park. First, you might tell us who Hamel and Park is.

Mr. **Pfunder**. Senator, Hamel and Park is a law firm of which I am a partner. I am here representing my own personal views, and the reason that that might be of any interest to anybody is that I headed the team of lawyers at the Federal Trade Commission that drafted the original rules and I take most of the blame and some of the heat for having created what is referred to as the partnership loophole, along with most of the rest of the Hart-Scott rules, at least in their original form. I supervised that program for the first three-and-a-half years that it was in existence at the Commission and have been in private practice since that time.

I am intrigued with and like the basic approach of S. 431 as a way of closing the partnership loophole, which I think is an important thing to do. I have in my prepared testimony a suggestion for a possible simplification of that approach that might remove some of the ambiguities of the proposed statutory language, and would also eliminate the prospect of most multiple reports and multiple waiting periods which might result from the language of S. 431, where it applies.

Briefly on the other proposals contained in S. 432, I share the Commission's views that raising the thresholds as a way of eliminating numbers of reports is not a good idea unless for some reason there is a high priority to eliminating reporting as such.

I frankly think the cost of receiving unnecessary reports is borne primarily by the agencies and is at least widely spread and relatively low for affected companies. In any case, the agencies have both the incentives and the tools to free up their resources from reviewing unnecessary filings by promulgating necessary rules that would limit the reporting obligations without undermining the ability to look at those transactions that they believe might raise antitrust issues.

I personally feel that the distinctions between cash tender offers and non-cash tender offers are insufficient to warrant any difference in the waiting periods for those two types of transactions. I think the initial waiting period could be extended to at least 26 days without raising any conflict with the Williams Act, and probably to 30 days to make it coincide with those for other transactions without doing substantial injustice to the Williams Act scheme. I also favor the extension of 20 days for cash tender offers if second requests are issued.

On the other hand, I do not personally think that the 60-day waiting period for billion-dollar transactions is a good idea, the primary reason being that I think extensions of that magnitude will have a significant impact in terms of favoring the incumbent management of a target company.

There are opportunities often availed of by the agencies to extend waiting periods through obtaining informal commitments from the merging parties in any case. I would say only if the agencies can indicate some frequency with which they either are not prepared to seek preliminary injunctions but would like to, or they seek them and do not get them because they are not adequately prepared, would there be justification for a waiting period extension of that magnitude.

Finally, on releasing Hart-Scott-Rodino data to the Federal and State agencies, my primary concern here has been previously expressed. I think making that information widely available will tend to undermine the confidence of filing parties in the ability of the agencies to keep their data confidential.

I think that is going to cause the agencies to devote additional staff resources to negotiating special confidentiality arrangements and will tend to divert them from the more important task of reviewing the transactions for their antitrust substance.

Senator, I appreciate the opportunity to present my views and would be happy to respond to any questions.

[Statement follows:]

HAMEL & PARK

TESTIMONY OF

MALCOLM R. PFUNDER

on S. 431 and 432

ANTITRUST, MONOPOLY, AND BUSINESS RIGHTS SUBCOMMITTEE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

February 26, 1987

HAMEL & PARK
WASHINGTON, D. C.

Good morning. My name is Malcolm Pfunder. I am a partner in the Washington, D.C., firm of Hamel & Park, where I have practiced antitrust law for the past six and a half years. In early 1977, shortly after the Hart-Scott-Rodino Antitrust Improvements Act of 1976 was enacted, I was hired by the Federal Trade Commission to establish and supervise its premerger notification program. Over the next eighteen months I headed a team of lawyers who drafted the rules implementing the notification provisions contained in Title II of the HSR Act. I retained supervisory responsibility for the Commission's Premerger Notification Program until I re-entered private practice in mid-1981.

My practice at Hamel & Park involves a considerable amount of Hart-Scott-Rodino work, and I have been active in the American Bar Association's Antitrust Section on HSR issues. I was the primary author of the *Premerger Notification Practice Manual* published last year by the Antitrust Section. I have been asked today to express my personal views on Senator Metzenbaum's proposed amendments to the Hart-Scott-Rodino Act contained in S. 431 and S. 432.

Background. As I am sure you know, the HSR Act requires that the parties to certain proposed mergers and acquisitions notify the Federal Trade Commission and the Antitrust Division of the Justice Department of their plans and then wait thirty days before consummating such transactions. Whether a particular transaction must be reported depends upon the sizes of the parties and the size of the proposed transaction. Generally, if either of the parties has sales or assets of at least $100 million, if the other party has sales or assets of at least $10 million, and if the acquisition involves either fifteen percent or $15 million worth of stock or assets of the acquired person, notification is required.

The purpose of the Act is to give the antitrust enforcement agencies the opportunity to decide during the thirty-day waiting period whether the proposed transaction may violate the antitrust laws. If either agency is concerned about the possible antitrust implications of a reportable transaction, it may ask the parties for additional information or documentary material (colloquially referred to as a "second request"). A second request stops the running of the waiting period until the persons to whom the request has been issued provide the requested information; this extended waiting period expires twenty days thereafter. During the extended waiting period, the investigating agency must typically decide whether to challenge the proposed transaction under § 7 of the Clayton Act. If the agencies decide that a transaction raises no significant antitrust issues, they may grant "early termination" of either the initial or the extended waiting period.

Cash tender offers receive special treatment under the Act. The initial waiting period for such transactions is fifteen days, rather than thirty, and extensions of waiting periods following second requests are only ten days long, rather than twenty.

S. 432. There are essentially five proposed amendments in S. 432. Section 1 of the bill would raise the smaller of the two so-called "size of person" thresholds from $10 million to $15 million in all cases. That section would also raise the "size of transaction" test from $15 million to $25 million in all cases. Section 2 would lengthen the initial waiting period and waiting period extension applicable to cash tender offers, so that they would be treated the same as all other transactions. Section 2 would also provide for a special sixty-day waiting period extension (in lieu of the normal twenty) where either agency has issued a second request in context of a transaction valued in excess of $1 billion. Finally, Section 3 of the bill would make confidential HSR information available to officers and employees of Federal and state law enforcement agencies for official law enforcement purposes upon prior certification that such information will be maintained in confidence.

Reporting Thresholds: Size of Person. Raising the size of person test from $10 million to $15 million in all cases would undoubtedly reduce the number of transactions subject to the Act. This proposal raises a fundamental question concerning the intended purpose of S. 432, however. If Congress believes simply that too many transactions are caught up by the Act's jurisdictional thresholds and that the cost of the reporting obligations and waiting periods to the economy and the society is too great, then one obvious solution is to reduce the number of filings by raising some or all of the thresholds to eliminate reporting of smaller transactions. A possible disadvantage of this approach is that it may have little to do with whether a particular transaction may violate the antitrust laws. There are thus two kinds of variables that may be relevant to evaluating this proposal: the cost of requiring what may be unnecessary filings and the possibility that transactions raising significant antitrust problems may escape scrutiny.

My personal view, based on my immersion in Hart-Scott-Rodino issues for four years at the Commission and six years in private practice, is that the real cost of requiring HSR notifications and waiting periods for the vast majority of transactions which are neither investigated nor challenged is low. Most medium and large sized companies and their lawyers have routinized the HSR process to a point where a filing can normally be put together in a few days at nominal cost. As to those transactions that raise no antitrust issues, early termination is routinely requested and granted by the enforcement agencies. In such cases, HSR reporting and waiting period requirements, in my experience, almost never delay the closing a transaction. Delays are, of course, sometimes encountered if one of the agencies investigates and challenges a transaction. However, in 1985, the most recent year for which published figures are available, 84 out of a total of 1,749 reported transactions were investigated (less than 5%), and roughly a dozen were challenged.

So why not reduce the reporting burden, if 95% of the transactions requiring filings are not even investigated? I believe that is highly desirable, to the extent it can be done without compromising the basic purposes of the Act. The challenge is to isolate the criteria which identify transactions which either will or will not likely raise significant antitrust issues, and to tailor amendments to the HSR Act accordingly.

Statistics published by the FTC do not help us determine how many transactions would escape filing requirements if the size of person test were raised from $10 million to $15 million. In 1984 there were 29 reported transactions in which the acquiring person's *assets* were less than $15 million. There were an additional 61 transactions in which the acquiring person's *sales* were less than $15 million, but there is no data on how many transactions involved acquiring persons with *both* sales and assets of less than $15 million, which is what you would need to know. In addition, there is no available data on the size of the *acquired* person. Again based on 1984 data, the only category involving relatively small acquiring or acquired persons which resulted in no significant investigation activity was transactions in which the assets of the acquiring person were less than $15 million.

My recommendation would be that, if raising size of person thresholds seems potentially attractive, the Subcommittee might request more recent data on filings and investigations by the agencies and assess the potential antitrust enforcement implications of such a change. Based on the most recent investigational activity by the agencies that I have seen, my personal view is that raising the size of person threshold does not appear warranted.

Reporting Thresholds: Size of Transaction. The proposal in S. 432 to raise the size of transaction threshold from $15 million to $25 million can be analyzed in a similar way. FTC data for 1984 show that the agencies investigated a significant number of transactions valued between $15 million and $25 million. Two hundred thirty-four transactions in that range were reported (21% of the total); 26 of these resulted in clearance by one agency to the other to investigate, and 13 resulted in second requests. Second requests were issued in these cases at a rate only slightly less than the rate for transactions of all sizes.

On the other hand, 132 (or 12%) of the reportable transactions that year were valued at less than $15 million. (Transactions valued at less than $15 million are reportable only if they result in the acquiring person's holding at least 50% of the acquired issuer's stock and that issuer has sales or assets of at least $25 million.) Those 132 transactions resulted in investigations involving second requests in only three cases during the entire year. Second requests were issued in these cases at a rate of around two percent, or only about one-third of the rate for all transactions valued at more than $15 million.

If data for more recent years is similar, the agencies' investigation patterns tend to suggest that, whereas transactions in which control of a company can be purchased for less than $15 million are not a frequent concern, stock and asset acquisitions valued between $15 million and $25 million raise significant antitrust issues nearly as often as larger ones do.

Therefore, raising the size of transaction threshold to $25 million will result in the agencies' not seeing notification reports on some transactions that they would probably investigate. Eliminating these transactions from HSR reporting would seem to require a judgment by Congress that it's more important to reduce the number of HSR filings than to identify relatively small transactions that may violate the antitrust laws. I personally would disagree with such a conclusion and therefore believe that the $15 million threshold should be retained.

There are other possible approaches available for reducing the number of HSR filings. For example, data for 1984 suggest that the agencies simply did not investigate stock acquisitions which resulted in the acquiring person's holding less than 50% of the acquired issuer's voting securities. Of a total of 785 reportable stock acquisitions, 665 were for control of a 50% interest or larger. The remaining 120 transactions were reportable because the acquiring person held only 15% or 25% or $15 million worth of the stock of the acquired person. These 120 transactions resulted in only three investigations in which second requests were issued. Acquisitions of 50% voting control and asset acquisitions valued over $15 million accounted for the other 68 transactions in which second requests were issued.

The agencies have rulemaking authority under § 7A(d)(2)(B) to "exempt from the requirements of [the Act] classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws." Thus the agencies could narrow the reporting requirements to reflect their experience in administering the HSR program over the eight years it has been in effect. Elimination of the 15% and 25% reporting thresholds for stock acquisitions in the present HSR implementing rules would appear (based on 1984 data) to reduce the number of filings by over 100 transactions (or 9%) without eliminating more than a handful of transactions which were investigated during that year.

This is something that the agencies can do without statutory amendments. Where a statutory change is not a prerequisite to a desired result, I have a personal preference for the rulemaking approach because I believe it more flexible and capable of better fine-tuning than the legislative process. I would therefore recommend that the Subcommittee encourage the agencies to develop appropriate changes in the notification thresholds through rulemaking, to eliminate unnecessary HSR reporting without substantially impairing the ability of the program to identify transactions raising significant antitrust issues.

Waiting Periods for Cash Tender Offers. S. 432 would lengthen to thirty days the initial waiting period for cash tender offers and to twenty days the extension of the waiting period resulting from issuance of a second request in the context of such offers. Originally underlying the shorter waiting period in cash tender offers were the perceptions that such offers are often hostile, that delay tends to favor incumbent management, that minimal regulatory interference with the market for transfer of corporate control was desirable, and that identification and prevention of anticompetitive mergers would not be substantially impaired by shorter waiting periods for these transactions.

Since the HSR Act was amended, the Williams Act waiting periods for tender offers have been lengthened, so that a cash tender offer must now remain open for at least twenty business days (a minimum of 26 calendar days) after it is made. Thus, if HSR filings are made simultaneously with the tender offer, the initial HSR waiting period could be lengthened to at least 26 days without any adverse effect and probably to thirty days without significantly affecting the balance between incumbent management and the tender offeror.

However, under S. 432 a transaction could be delayed well beyond this initial period, if a second request is issued to the offeror. (Second requests to the targets of tender offers do not lengthen the waiting periods.) Even if a second request can be promptly complied with (in my experience, a week is a quick response), the waiting period is extended for the time it takes the recipient to respond, plus ten days, and S. 432 would lengthen that ten days to twenty. Thus, a second request could extend the HSR waiting period by several weeks beyond the expiration of the Williams Act's twenty business day period. By comparison, the present HSR provisions allow for a fifteen-day initial waiting period, a hypothetical seven-day prompt response to a second request, and a ten-day extension of the waiting period -- a total of only a few days more than the Williams Act's period.

It seems clear that the longer HSR waiting periods will favor incumbent management attempting to resist a hostile takeover, and in some cases it may make a significant difference. My personal view is that this impact will occur only in cases raising antitrust issues serious enough to warrant investigation and that, if the agencies need the additional time in order to assess these issues, the cost would therefore be justifiable. I also believe that an increasing number of cash tender offers are not in fact hostile, that the agencies have historically been quite sensitive to the need to avoid influencing the outcome of hostile takeovers except where antitrust considerations warrant, and that time constraints on the agency staffs are presently too severe.

However, it is important to test these views by asking the agencies whether they believe that additional time is necessary and that their law enforcement efforts could be more effective as a result. If additional time is not needed by the agencies, it may not be worth the cost.

Waiting Periods for $1 Billion Transactions. S. 432 would extend the waiting period following compliance with a second request to sixty days (from the present twenty, and from ten for cash tender offers) where, as a result of the transaction, the acquiring person would hold assets and/or voting securities of the acquired person valued at more than $1 billion.

I believe that the addition of forty (or fifty) days to the HSR waiting period could affect the outcome of a significant number of hostile or contested takeovers. That is a long time to give the management of the target to marshal its defensive resources or locate a white knight. While the waiting period will be extended only where second requests have been issued, that fact makes it likely that most or all of the additional time will in fact be used by the agencies in their investigations. In 1984, a sixty-day waiting period extension would presumably have occurred in all seven (or 35%) of the twenty reported transactions valued at more than $1 billion in which second requests were issued.

It is not clear to me that the size of the acquiring person's holdings is particularly closely related to the complexity of the necessary antitrust analysis. Moreover, the enforcement agencies are often able to negotiate commitments by parties to a proposed merger to defer their closing while a determination is made whether to challenge the transaction. Indeed, if lack of time were a really severe problem, one would expect more frequently to see the agencies forced to seek preliminary injunctions without being properly prepared, and thus to lose them. Alternatively, the agencies might avoid seeking injunctions against anticompetitive transactions because of inadequate opportunity to prepare their cases. While I would suggest that the Subcommittee question the agencies on this point, my impression is that these are not common occurrences.

I therefore personally would recommend against this change in the absence of a strong justification by the enforcement agencies. If a change of this kind is seriously considered, I would urge an extension of considerably less than sixty days.

I also believe that, if such a change is considered, the approach in S. 432 is preferable to that in the recently-introduced H.R. 586. That latter proposal would lengthen the waiting period extension to sixty days for transactions resulting in the acquiring person's holding assets in the United States valued at, or generating "probable annual sales" of, more than $1 billion. The extension would thus automatically apply to any acquisition (no matter how small) by a corporation already having U.S. assets worth (or generating sales of) more than $1 billion. In addition, H.R. 586 would make extension of the waiting period mandatory and appears to preclude early termination by the agencies. It seems to me that there is no reason to eliminate agency discretion to allow a transaction to close as soon as a decision is made not to challenge it under the antitrust laws.

Providing HSR Information to Federal and State Agencies. S. 432 would authorize (and, as I read it, effectively require) the FTC and the Justice Department to make any information or documentary material filed under the HSR program available upon request to officers and employees of "appropriate" Federal law enforcement agencies or to any officer or employee of any state law enforcement agency upon prior certification that such information will be maintained in confidence. However, any information so obtained may be used (and thus presumably made public) only "for official law enforcement purposes," including for preparation of comments to be submitted in connection with evaluation of any antitrust consent order or decree proposed by the FTC or the Justice Department.

This proposal raises a number of difficult policy considerations. I believe that one of the reasons the HSR program has had such a high degree of voluntary compliance is that the confidentiality of sensitive business information filed with the agencies has been diligently protected. Filing parties have come to trust the FTC and the Justice Department staffs to respect the requirement of confidentiality and to return HSR filings and information at the conclusion of agency investigations.

While disclosure to Congress is authorized by the present statute, I believe it has seldom been requested. As a result, there has been little fear by filing parties that sensitive information will become public, and little agency staff time has, to my knowledge, been spent negotiating special compliance arrangements or litigating issues raised by claims of needs for extraordinary confidentiality protection.

Knowledge that HSR filings and responses to second requests may find their way to other (unspecified) Federal and state law enforcement agencies is bound to increase the hesitancy of parties to provide data that, for whatever reason, they regard as extraordinarily sensitive. I believe this will impose additional burdens and costs on the FTC and the Justice Department in the course of their merger investigations.

To be sure, state attorneys general have the authority to bring parens patriae suits in Federal district courts under Federal antitrust law, including § 7 of the Clayton Act. They may have an interest in commenting upon consent decrees proposed by the FTC or the Antitrust Division insofar as such decrees would affect interests within their respective states. They typically have the authority to enforce state antitrust statutes, including those relating to mergers and acquisitions. However, they also have subpoena powers, discovery procedures, and public information available to them in these contexts.

I personally am concerned with broadening the availability of HSR data to such a potentially large group, because I think it will make it more difficult for the FTC and Justice Department staffs to obtain the information they need to evaluate reportable transactions. However, as long as state and Federal agencies have legitimate need for HSR data in the course of their official responsibilities, a strong argument can be made that such data ought to be made available to them, if they agree to protect its confidential status. The issue is a difficult one, but I believe, on balance, that the potentially disruptive effect outweighs the potential value of making HSR information available to other Federal and state agencies.

S. 431. Only a single amendment to the HSR Act is proposed in S. 431. A new subsection (k) provides that, in the case of a partnership, the statutory term "person" shall include any general partner and any partner with an equity interest of 50% or more. The intention appears to be to close the so-called "Boone Pickens Loophole" under which undercapitalized partnerships making large acquisitions escape reporting because the partnership, as the "acquiring person", does not satisfy the statutory size of person tests.

S. 431 would close this loophole by requiring HSR notification whenever acquisitions satisfying the size of transaction test are made by partnerships whose partners in some manner satisfy the size of person tests. I say "in some manner" because the proposed amendment does not specify whether the reportability of an acquisition by a partnership should be separately analyzed as though it were being made by each general partner and by each partner having a 50% or larger equity interest, or whether the partnership and all of its qualifying partners should somehow be treated as a single person.

The ambiguity in the proposed wording has several possibly troubling implications. First, if each partner is viewed as making a potentially reportable acquisition, then multiple HSR notifications might be required with respect to a single acquisition. Each would trigger a filing by the acquired person and begin a separate waiting period. Presumably the acquisition could not be completed until all such filings had been completed and all such waiting periods had expired or been terminated. Second, the agencies would not be able readily to determine when all required filings had been received and therefore when the waiting periods would expire. Finally, the information contained on these multiple filings might well be fragmented and difficult to interpret.

It seems to me that, in closing this loophole, one goal ought to be to obtain from partnerships making significant acquisitions a single notification containing the information about both the partnership and its partners which the agencies need in order to assess the antitrust implications of their purchase. A second goal should be to assure that acquisitions by parties having significant sales or assets not be insulated from reporting because a partnership which they create as an acquisition vehicle has no sales and only minimal assets. A third goal would be to avoid allowing the potential complexities of partnership arrangements to complicate unnecessarily the reporting rules applicable to partnerships.

My suggestion is that, if an acquisition by a partnership is reportable under the Act and rules as they are presently worded, no change is required. To the extent that present HSR notification forms do not request disclosure of the identities or business interests of the partners, the agencies should use their rulemaking authority to expand the information required.

An acquisition by a partnership, not otherwise reportable under the current Act and rules, should be subjected to an additional size of person test which would require aggregation of the assets of all general partners and the partnership itself. If the size of person test is thereby satisfied, then the partnership would be required to file notification as an acquiring person. The partnership could delegate its filing responsibility (under § 803.2(a) of the present HSR rules) to any entity (e.g., one of the partners) included within it.

Again, if the agencies believe that the present Notification and Report Form is inadequate to obtain necessary information about the individual partners, rules should be promulgated that would appropriately expand its requirements. The statute might be further amended to require aggregation of the revenues or sales of the partners with those of the partnership, but that is probably unnecessary to close the loophole satisfactorily and would surely increase the complexity.

I would not include limited partners in the calculus, regardless of the extent of their equity interests, since limited partners are normally passive participants and since notification by corporations is not affected by holders of non-voting securities. If Congress were to decide that reportability of partnership acquisitions should be premised in part on the identity and sizes of limited partners, I would urge a comparable change with respect to corporations, in order to avoid creating any artificial incentive to select one structure over another.

This proposal would have the advantage of closing the existing loophole without creating confusing multiple filings and waiting periods. Each agency, of course, must be able where necessary to issue second requests to the partnership and to its individual partners in the course of an antitrust investigation. If the partners of a partnership making a reportable acquisition are treated as part of the acquiring "person," I believe that the agencies have that power under § 7A(e)(1). If necessary, this point could be clarified in legislative history.

The statutory language necessary to implement this suggestion might read as follows:

> For purposes of subsection (a)(2), the total assets of a partnership shall include the assets of the partnership and those of each of its general partners.

The details of implementation can be accomplished by agency rulemaking.

A couple of technical implications of this proposal should perhaps be articulated. Under both S. 431 and my suggested variation of it, a partnership would remain its own ultimate parent entity. A partnership would not be controlled by any of its partners individually or collectively. Thus two partnerships having a common partner would not aggregate their assets when one partnership made an acquisition. Nor would there be any aggregation of the assets of individual partners, or of partners with the partnership, in the context of acquisitions by a partner in his or her individual capacity. In other words, there would be only a limited, relatively simple change to the present reporting scheme. It is possible that additional consideration should be given to the question whether transfers of "partnership interests" should be reportable. At present they are not, and neither S. 431 nor my proposal would alter that.

Conclusion. I hope my testimony and suggestions may be useful to the Subcommittee, or at least thought provoking. I would be pleased to explore any of these ideas further, in whatever manner may be helpful. I appreciate the opportunity to present my views.

Senator METZENBAUM. I will be very brief. When the Hart-Scott-Rodino Act was passed in 1976, there was an effort to coordinate the time for review of cash tender offers with the Hart-Scott-Rodino waiting period, but the shareholder response period in 1976 was only 7 to 10 days, whereas today it is 20 business days, or about 28 calendar days.

I think that conforms with what you have said, Mr. Pfunder, that the time can be lengthened even aside from other considerations and can conform with the Williams Act.

Mr. PFUNDER. Yes, sir.

Senator METZENBAUM. We might have a couple of other questions, but generally speaking I think the testimony today indicates that there is general consensus that there is a need for some action in some of these areas and some room for negotiation in some of the other areas.

Conspicuous by their absence are the Business Roundtable and the U.S. Chamber of Commerce. So that there be no misunderstanding, they were invited. There was no unwillingness on their part to appear, but there was some difficulty in their getting their position together in time for this hearing. They have agreed to submit their position to us. We are looking forward to hearing from them shortly.

We also invited the Department of Justice, but they are in Europe on a conference. I am not so sure that that is not good judgment on their part. It is a very nice place to be, I suppose. But we look forward to working with them and with all other interested parties.

The Chair has a timetable, and my timetable is now, so that I would say to anyone interested in this subject, if you want to work with us, we are prepared to sit down and meet with you. My staff is available.

We want to move with as much dispatch as possible, and if the FTC beats us in the timetable, all well and good. We do not have any particular pride of authorship. We just want to get the loophole closed, and we want to make some other changes as well that have already been discussed.

I want to thank all of those who have participated. Our doors are open to you and we look forward to working with you. This hearing is concluded.

[Whereupon, at 10:50 a.m., the subcommittee was adjourned.]

APPENDIX

National Association of Manufacturers

JAMES P. CARTY
Vice President
Government Regulation, Competition & Small Manufacturing

March 11, 1987

The Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear ~~Senator Thurmond~~ Strom:

The Antitrust Subcommittee of the National Association of Manufacturers recently held a meeting to assess its position on a number of issues. As the Monopolies, Antitrust, and Business Rights Subcommittee currently is considering legislation that would amend the Hart-Scott-Rodino Act, I would like to forward to you NAM's position on S.431 and S.432.

NAM supports both bills in principle, but encourages the Monopolies, Antitrust, and Business Rights Subcommittee to consider several improvements. Specifically, S.431 should be amended to grant an exemption for partnerships formed for the purpose of conducting real estate transactions. We believe this change is needed to avoid burdening the government with unnecessary applications.

While NAM supports the increase of the threshold amount for premerger notification as contained in S.432, this amount should be based on the assets of the parties proposing the merger, and not on the surviving entity. In addition, the extension of the waiting period should be flexible enough to allow more discretion on the part of the reviewing agencies. Finally, NAM strongly opposes sharing premerger notification information with State attorneys general and other law enforcement agencies. Confidentiality is crucial while such proposals are taking place; the broader the number of personnel with access to such information the more likely it is that inadvertent or intentional premature disclosure will occur. The current system of ensuring confidentiality has worked well for both business and the government, and we believe insufficient evidence has been presented to warrant changing a system that is functioning properly.

We also note that the Federal Trade Commission and the Department of Justice have recently published a proposed rule that accomplishes the same purpose as S.431. Because of this administrative action we would suggest you consider postponing any legislative activity while the proposal is reviewed. Once the proposal has been reviewed, your Subcommittee would be in a better position to evaluate the need for S.431.

It would be appreciated if you could place these comments into the hearing record for S.431 and S.432. Thank you for your time and consideration.

Sincerely,

James P. Carty
Vice President
Government Regulation,
Competition and Small
Manufacturing

GEORGE W. DOUGLAS AND COMPANY
Economic Counsel
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Austin, Texas 78701

March 12, 1987

The Honorable Strom Thurmond
The United States Senate
Committee of the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to express my grave concern about the current proposals to revise the Hart-Scott-Rodino Act. I offer these comments from my perspective and experience as a Commissioner of the Federal Trade Commission (from 1982-85) in enforcing the Clayton Act under HSR authority.

First, as to the expanded time limits proposed in the bill: It was my experience that the existing time limits were perfectly adequate to properly assess the competitive impact of even the large and complex mergers we reviewed at the FTC. As a practical matter, the statutory limits do not serve as a serious impediment or time limitation for complex transactions as the Commission's investigators have the authority to certify the time that the applicants' response to the second request for information is substantially complete. Secondly, in every instance from my experience, applicants would oblige our staff's request for an extension of time. On the other hand, a statutory extension of the time frame in HSR would surely be utilized by the Commission and Justice--not to assemble a better record but simply resulting in a postponement of action and decision (as it is human nature to postpone decisions until they are absolutely necessary) with consequent economic injury to the vast majority of proposed mergers which are determined to be legal.

Second, and of greatest concern to me, the proposal to release HSR documents provided by the applicants to state Attorneys General: This strikes me as flatly inconsistent with the fundamental balance drawn in the HSR Act itself--the mandatory postponement of all significant mergers for a review of their legality, in exchange for an orderly process of review by federal authorities using the same criteria. More fundamentally, the HSR process is established to facilitate an orderly, systematic enforcement of the Clayton Act from a consistent national perspective.

To insert state AGs into the premerger clearance process would have enormous and significantly disruptive implications. While the federal agencies--FTC and DOJ--strive to maintain consistency in enforcement criteria, it is fatuous to expect the same of the fifty state agencies. Arguably, a proposed merger may be found to be legal by the two federal authorities and forty-nine state AGs, only to face lawsuit by one whose perceptions of the Clayton Act are aberrant. The likelihood of the failure of such a suit would still render the process of mergers to be very costly, and possibly discourage many beneficial mergers.

The Honorable Strom Thurmond
March 12, 1987
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I understand that some Attorneys General, and perhaps others, would prefer that other--perhaps "social"--considerations be employed in antitrust enforcement, rather than scrupulously restricting enforcement on the basis of injury to competition. This concerns me very much, and it needn't take much imagination to see the inclusion of Attorneys General in the premerger enforcement process to forecast the result.

Let me provide one example: When the Commission was recently considering a major merger in the petroleum industry, the Attorney General of Pennsylvania requested to meet with me. At our meeting he explained that he had great concerns about the proposed merger, and urged that we "take a particularly hard look at it." I assured him that we certainly would, and inquired whether there were any factors concerning this merge that he would like us to be particularly mindful of. His reply--in all seriousness-was that it would likely cause a consolidation of headquarter staffs and that there might be a loss of some seven thousand jobs in Pittsburgh!

It is easy to understand the political pressures which Attorneys General face. It is precisely these regional and parochial political interests which I would assume guided Congress in enacting Hart-Scott-Rodino in placing jurisdiction solely with the federal authorities.

I hope my comments are helpful. Please let me know if I may be of assistance.

Very truly yours,

George W. Douglas

GWD/rfc